SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1933

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

L. 187

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS,
Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed May 20, 1930

To the Honorable the Court of Claims and to the Honorable the Judges Thereof:

The claimant, R. H. Stearns Company, by this, its petition, respectfully shows:

1. The R. H. Stearns Company is a corporation incorporated December 17, 1915, under the laws of the State of Massachusetts, and has its principal place of business at 140 Tremont Street, Boston, Massachusetts.

2. The claimant has a just claim against the defendant for $14,928.07, Federal Income and Profits taxes overpaid [fol. 2] for the year 1918, and instead of refunding same it was illegally credited against an alleged additional tax for the period ended July 31, 1917.

3. R. H. Stearns Company filed its income and profits tax return for the year ended July 31, 1918, on or about October 15, 1918, and paid taxes thereon in the amount of $170,040.23. Thereafter, on or about June 28, 1924, the Commissioner of Internal Revenue filed and allowed an overpayment in the amount of $14,928.07.

4. Thereupon, the Commissioner of Internal Revenue instead of refunding said overpayment to the claimant, erroneously and illegally credited same against alleged additional taxes for the year July 31, 1917.

5. The income and profits tax return of the R. H. Stearns Company for the year 1917 was filed on or about October 15, 1917.

6. The aforesaid overpayment of $14,928.07 for the year 1918 was credited against the additional taxes for the year 1917 on to-wit June 28, 1924, more than five years after the return for 1917 was filed.

7. Claims and demands have been filed with the Commissioner of Internal Revenue for the refund of the aforesaid $14,928.07, but the said Commissioner refuses to make and has not made said refund.

8. Section 609 (a) of the Revenue Act of 1928 provides that:

"Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

Section 607 of the Revenue Act of 1928 provides that:

[fol. 3] "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claims."

Section 277 (a) (2) of the Revenue Act of 1924 and Section 277 (a) (3) of the Revenue Act of 1926 provide that:

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes,' approved August 5, 1908, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

9. The claimant has at all times borne true allegiance to the Government of the United States. It has not in any

way voluntarily aided, abetted or given encouragement to rebellion against such Government. The claimant is the sole and absolute owner of the claim here presented. The claimant has made no transfer or assignment of said claim or of any part thereof or of any interest therein. It is justly entitled to the amount claimed from the United States of America, after allowing all just credits and set-offs.

[fol. 4] 10. The claimant believes the facts as hereinabove stated to be true.

Wherefore, the claimant prays judgment in its favor against the United States of America for the sum of $14,928.07 with such interest and costs as are allowable by law.

R. H. Stearns Company, by R. W. Maynard, Pres.
William N. Wood, Attorney for Claimant, Woodward Building, Washington, D. C.

Duly sworn to by R. W. Maynard. Jurat omitted in printing.

[fol. 5] II. General Traverse—Filed June 28, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles B. Rugg, Assistant Attorney General.

III. Argument and Submission of Case

On June 6, 1932, this case was argued and submitted on merits by Mr. Howe P. Cochran, for the plaintiff, and by Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 6] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Whaley, J.**—Filed March 13, 1933

Mr. Howe P. Cochran for the plaintiff. Messrs. William N. Wood and Frederick S. Winston were on the briefs.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. Messrs. Charles R. Pollard and Joseph H. Sheppard were on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Plaintiff is a corporation, organized December 17, 1915, under the laws of the State of Massachusetts, with its principal place of business at 140 Tremont Street, Boston, Massachusetts.

2. On September 29, 1917, plaintiff filed with the collector of internal revenue its income tax return for the fiscal year ending July 31, 1917, disclosing a tax of $7,863.88, which was assessed and on January 14, 1918, paid in full.

On the same date, to wit, September 29, 1917, plaintiff filed with said collector its profits tax return for the fiscal year ending July 31, 1917, disclosing a tax of $9,369.32, which was assessed, and on January 14, 1918, paid in full.

The total of these two assessments was $17,233.20.

3. By reason of increased rates in the war revenue act of 1917, plaintiff, on April 10, 1918, filed another tax return for income and profits for the fiscal year ending July 31, 1917, disclosing a revised income and profits tax, combined, of $20,055.03, an increase of $2,821.83. Thereafter certain corrections in computation of the tax were made, whereby the tax under the war revenue act was increased to $27,918.80, a further increase of $7,863.77. The aggregate increase was $10,685.60, which was assessed and on June 7, 1918, paid in full.

The Bureau of Internal Revenue made an audit of plaintiff's returns for the fiscal year ending July 31, 1917, and as a result assessed the plaintiff an additional sum of $10,402.36, which was paid in full October 15, 1920.

[fol. 7] 4. Plaintiff filed its income and excess profits tax return for the fiscal year ended July 31, 1918, under the revenue act of 1917, on October 29, 1918, and on June 19, 1919, it filed its income and profits tax return for the same

year under the revenue act of 1918. The tax shown due on such returns was duly assessed and paid.

5. On February 19, 1921, plaintiff signed and filed with the Commissioner of Internal Revenue an instrument in writing which stated that plaintiff, "in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the act of Congress, approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered * * *."

The Commissioner of Internal Revenue, at that time D. H. Blair, endorsed his approval thereon February 6, 1923. According to regulations of the Commissioner of Internal Revenue promulgated on or about April 11, 1923, this so-called "unlimited waiver" expired April 1, 1924.

6. On February 19, 1923, plaintiff signed and filed with said commissioner the following instrument in writing:

"In pursuance of the provisions of subdivision (d) of section 250 of the revenue act of 1921, R. H. Stearns & Company, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917, and July 31, 1918, under the revenue act of 1921, or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, irrespective of any period of limitations provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive, and thorough consideration, and not on superficial determination of the true liability."

The commissioner's signature thereto was subscribed by an authorized officer April 7, 1930. The Commissioner of Internal Revenue April 7, 1930, was Robert H. Lucas, and his term as commissioner extended from June 1, 1929, to August 15, 1930.

7. In June, 1923, the commissioner assessed against plaintiff a still further amount of $22,189.10 for the fiscal year ending July 31, 1917.

The commissioner signed and certified this assessment June 26, 1923, and on the assessment listed attached thereto was the following notation opposite the item of $22,189.10 pertaining to plaintiff: "7/31/17 Fisc 1753361 OL 4/17/23 Waiver." There has been no offer of proof as to what particular document the word "waiver" had reference. The same schedule also contained the following notation: "Collector: Withhold demand pending comparison with schedule [fol. 8] of overassessment (Form 7805) No. 6246."

8. On or about July 12, 1923, the commissioner certified an overassessment in favor of plaintiff for the fiscal year ending July 31, 1916, of $1,431.96. This was applied by the collector against the unpaid balance of $22,189.10 on taxes for the fiscal year ending July 31, 1917, reducing said balance to $20,757.14, payment of which was demanded by the collector August 3, 1923.

9. On August 9, 1923, the plaintiff filed with the commissioner a claim for refund and credit of income tax alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that of this amount $20,757.14, the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment of $35,727.10, and the remainder, $14,969.96, be refunded.

It was the practice in the collector's office at the time this claim for refund and credit was filed, to treat such claims as a stay of collection of the unpaid taxes against which the credit was sought to be applied, until the commissioner had considered and adjusted the claim.

10. On March 1, 1924, the commissioner approved a schedule of overassessments, including an overassessment in favor of plaintiff of $14,928.07 for the fiscal year ending July 31, 1918, and transmitted it to the appropriate

collector for his action in accordance with the directions appearing thereon. The collector complied with the commissioner's instructions and on June 12, 1924, signed and returned said schedule to the commissioner, together with a schedule of refunds and credits, certifying the application of the said amount of $14,928.07 as a credit. The commissioner signed the said schedule of refunds and credits June 28, 1924, on which appeared the credit in favor of plaintiff of $14,928.07, and the commissioner on or after March 1, 1924, transmitted to plaintiff a certificate of overassessment of the foregoing amount for the fiscal year ending July 31, 1918. The said overpayment of $14,928.07 for the fiscal year ending July 31, 1918, was thus applied as a credit in partial extinguishment of the remaining liability of $20,757.14 for the fiscal year ending July 31, 1917, thereby reducing said liability to $5,829.07.

11. The collector, on September 1, 1924, issued a demand on plaintiff for payment of the final balance of $5,829.07, with accrued interest of $403.18. These two amounts were paid by plaintiff September 15, 1924.

12. On May 16, 1930, plaintiff filed with the commissioner claims for refund for the fiscal years ending July 31, 1917, and July 31, 1918, each in the amount of $14,928.07, on the ground that said amount had been illegally assessed and also illegally collected after the statutory period of limitation therefor had expired, and that there were no valid waivers on file with the commissioner.

13. There is no evidence that at any time the Commissioner of Internal Revenue requested of or suggested to plaintiff that waivers be filed.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to re-
[fol. 9] cover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

WHALEY, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover an overpayment of $14,928.07 found by the commissioner due the plaintiff for the taxable year 1918 and applied to a deficiency for the year 1917. At the time of the application the plaintiff had filed a waiver signed by it, but the signature of the commissioner was not placed thereon until several years after the tax liability for the years in question had been finally adjusted.

For the fiscal years 1917 and 1918 plaintiff filed its income and income and profits tax returns and paid the taxes therein disclosed. The five-year period provided for in sec. 250 (d) of the revenue act of 1921, in which collection could be made for any additional assessment on the 1917 return, expired April 10, 1923, "unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax."

In February, 1921, the plaintiff executed an unlimited waiver, and the commissioner signed this waiver on February 6, 1923. This waiver expired on April 1, 1924, under the provisions of the commissioner's mimeograph letter 3085 (Cumulative Bulletin II-1, p. 174).

The five-year limit on the 1918 return for additional assessment expired June 19, 1924. The plaintiff, therefore, on February 19, 1923, executed another waiver covering both the year 1917 and the year 1918 and, instead of being unlimited in time, expired by its terms on March 1, 1925. On June 26, 1923, the Commissioner of Internal Revenue made an additional assessment against the plaintiff for the fiscal year ended July 31, 1917, in the sum of $22,189.10. Following this assessment the plaintiff filed on August 9, 1923, a claim for refund and credit for the four fiscal years, commencing August 1, 1917, and ending July 31, 1921.

After an audit of the various years covered by the claim for refund and credit, the commissioner on March 1, 1924, one month before the first waiver had expired, and within the period of the second waiver, approved a schedule of overassessments, including an overassessment in favor of plaintiff for $14,928.07, and transmitted it to the appropriate collector for action in accordance with the directions appearing thereon. On June 12, 1924, the collector re-

turned the said schedule with his certification of the application of the credit in accordance with instructions and also forwarded to the commissioner at the same time a schedule of refunds and credits on which the said overpayment in favor of plaintiff was shown as having been credited. The commissioner signed the schedule of refunds and credits June 28, 1924, and transmitted a certificate of overassessment to plaintiff. The said overpayment was thus applied as a credit against the remaining unpaid tax liability for the fiscal year ending July 31, 1917, reducing the outstanding liability for that year to $5,829.07 which was paid September 15, 1924, after a second notice and [fol. 10] demand on September 1, 1924. The commissioner's signature was not placed on the waiver of February 19, 1923, until April 7, 1930.

On May 16, 1930, the plaintiff filed two claims for refund, each in the amount of $14,928.07 for the fiscal years ended July 31, 1917, and July 31, 1918, respectively.

The sole contention of the plaintiff is that the signature of the commissioner, having been placed on the waiver many years after the period for assessment and collection, was ineffective for the validation of such collection. The purpose of a waiver is to extend the time fixed by statute in which an assessment and collection could be made by the commissioner and the desire of the taxpayer in executing it is to have his returns carefully and deliberately examined and audited for the years in question so he can receive the benefit of any errors, overassessments, and corrections of alleged underpayment. The statute does not require or demand that the actual waiver executed by plaintiff be signed by the commissioner. It only provides both commissioner and taxpayer consent in writing to a later determination, assessment, and collection.

When the additional assessment was made June 26, 1923, the statute had not run even under the first waiver, which did not expire until April 1, 1924, and collection could, and undoubtedly would, have been then made had it not been for the action of plaintiff in filing a claim for refund and credit in August, 1923, at or about the time demand was being made for the payment of the tax. As a result of the filing of the claim, a consideration of which necessitated an examination of plaintiff's returns for four years beginning in 1917 and ending in 1921, and thus might well have re-

quired, and did require, more time than remained until the first waiver expired, it is certainly reasonable to say that in such consideration the commissioner relied upon the second waiver which was then on file.

It is thus evident that plaintiff benefited, at its own request, by the actions of the commissioner under the second waiver. Collection of $20,757.14 was withheld from August, 1923, until September, 1924, when, as a result of the application of the credit, plaintiff had to pay only $5,829.07. The first waiver included only the year 1917 and the second waiver included both 1917 and 1918; clearly the commissioner acted under the greater which included the lesser in the number of taxable years and in time extension. The plaintiff derived an advantage by the execution of the waiver. In the case of Liberty Baking Company v. Heiner, 37 Fed. (2d) 703, the court said:

"* * * it would be unconscionable to allow the taxpayer to afterwards repudiate a consent upon which the commissioner has acted and relied. It appears that, in the circumstances, the execution of the waivers was a necessary incident to the securing of further consideration of the plaintiff's tax liability."

The plaintiff in this case accepted the benefits of the commissioner's acts under the waiver and, for almost seven years did nothing to indicate the lack of the signature of the commissioner on the waiver before its expiration in any way affected its binding effect. It was not until the signature of the commissioner was placed on the waiver more than six years after the collection had been made that the plaintiff filed a refund claim for the amount of the overassessment for the fiscal year 1918, and within four days thereafter suit was commenced in this court. The [fol. 11] statutory period of six months in which the commissioner has to pass on a refund claim before suit can be commenced was ignored. The suit is based on an account stated. Bonwit-Teller Co. v. United States, 283 U. S. 258.

If the waiver given on February 19, 1923, is valid and binding all the acts of the commissioner are timely and proper. In our opinion the contention of the plaintiff is without merit and most technical in nature and effect. There is nothing in the statute which requires the commissioner to give his consent in any particular time or

period to the waiver. It is not disputed that he did sign the waiver. The contention is his signature was not placed thereon until the extension period named in the waiver had expired. But when settlement was made and for many years afterwards while the waiver was without the actual signature of the commissioner, the plaintiff did not complain; on the contrary, it accepted the benefits under the waiver, and no action was taken until the signature was attached years afterwards.

In Eclipse Lawn Mower Co. v. United States, No. K-40, decided by this court November 14, 1932, the proof was that a waiver had been filed in response to a written request by the commissioner and had been misplaced and could not be produced in evidence. The assessment list, as in the instant case, was endorsed "waiver." The court held that the signing of the assessment list by the commissioner with the endorsement "waiver" on it was sufficient under the statute. In the present case the assessment list contained the word "waiver." It is contended that only the first waiver was meant by the use of this word. But we can see no reason for such an implication and restriction of its use. Both waivers were on file at the time and the second waiver included both years under controversy, and, in our opinion, the intendment by the use of the word applied to the second and not to the first waiver which only covered the one year.

In Sabin v. United States, 70 C. Cls. 574, this court held valid a waiver which the taxpayer had attempted, by written instrument, to revoke prior to the endorsement thereon of the commissioner's approval. The court said:

"The statute does not require that a consent, in order to be valid, must be in one instrument or that it shall be in any particular form. All that is required is that the consent be evidenced in writing. * * *

"The statute requires no more than that there shall be written evidence of the fact that both parties understand that the limitation period specified in the statute is not to govern the matter and, therefore, that when a date to which the period has been extended is specified there shall be a complete understanding about it. No date was specified in the waiver in this case but the writings leave no doubt as to the understanding of the parties that the period specified in the statute was not to control."

In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. But by some mysterious channel, after six years, the plaintiff learns the commissioner has placed his signature to the waiver and then for the first time he complains about what [fol. 12] was the understanding. No complaint was made while his signature was lacking.

A taxpayer can execute a voluntary waiver after the statutory limitation has expired. Stange v. United States, 68 C. Cls. 395, 282 U. S. 270.

In the case of Trustees for Ohio & Big Sandy Coal Co., 43 Fed. (2d) 782, the court in commenting on a waiver given after the bar had allegedly fallen, said:

"As to the signing of the written waivers by the commissioner, all that is required by the statute is that the commissioner and taxpayer consent in writing to the extension. * * * But, apart from this, the taxpayer, by the execution of the waiver, has obtained delay in the assessment of additional taxes and a more deliberate and thorough consideration of the questions involved. Under such circumstances the taxpayer ought not be heard to urge the bar of the statute, which it expressly agreed to waive."

In Commissioner v. Hind, 52 Fed. (2d) 1075 (Circuit Court of Appeals for the 9th Circuit), the court held that a waiver being a unilateral agreement did not require the signature of the commissioner to give it effect. It is unnecessary for us to follow this decision to the extent it goes because in the case before us the commissioner did sign the waiver although many years had elapsed after its expiration. The signature of the commissioner having been given to the waiver together with the other circumstances of the case, we believe, and so hold, that the acts of the commissioner were valid and proper under a consent in writing by both parties.

The facts in the case of Mosier v. Goodcell, 49 Fed. (2d) 391, are very similar to the facts in this case and in the Mosier case the court held:

"It would seem by the decisions that the written approval by the Internal Revenue Commissioner is not

deemed indispensable to the validity of a waiver. As was said in Stange v. United States, hereinabove cited: 'A waiver is not a contract, and the provision requiring the commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by a taxpayer.' Also in Aiken v. Burnet, above cited: 'The requirement in section 250 (d) of that act that the commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract for waivers.' It should be held, in my opinion, that where a taxpayer deposits with the Internal Revenue Commissioner a written waiver in due form and that waiver is accepted and acted upon, the date when the commissioner actually indorses thereon his written approval does not change the date when the waiver becomes effective."

In our opinion the petition should be dismissed. It is so ordered.

Williams, Judge; Littleton, Judge, and Green, Judge, concur.

Booth, Chief Justice, took no part in the decision of this case on account of illness.

[fol. 13] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 13th day of March, A. D. 1933, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On April 6, 1933, the plaintiff filed a motion to modify the Court's opinion.

On May 8, 1933, the court overruled said motion.

[fol. 14] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,736. Court of Claims. Term No. 133. R. H. Stearns Company, Boston, Massachusetts, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1933. File No. 133, O. T., 1933.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4052)

FILE COPY

FILED
JUN 7 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

FREDERICK S. WINSTON,
Counsel for Petitioner.

HOWE P. COCHRAN,
WILLIAM N. WOOD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Supreme Court of the United States:

The petition of the R. H. Stearns Company, of Boston, Massachusetts, respectfully shows to this Honorable Court:

Summary Statement of Matter Involved.

1. The petitioner herein is a Massachusetts corporation with its principal place of business in Boston, Massachusetts (R. 4). It seeks: (1) Relief against

gratuitous remarks made in an opinion of the Court of Claims reflecting upon the character of the petitioner and damaging to the reputation of the petitioner and/or its attorneys; (2) Review of a decision by the Court of Claims dismissing petitioner's suit against the United States of America for $14,928.07 Federal income and profits taxes overpaid for the fiscal year ended July 31, 1918, and not refunded to it.

2. On or after March 1, 1924, the Commissioner of Internal Revenue transmitted to the petitioner a certificate of overassessment for the fiscal year ended July 31, 1918, showing an overpayment of $14,928.07 (R. 6-7). This overpayment was not refunded but instead was credited to an additional tax for the fiscal year ended July 31, 1917, assessed on June 26, 1923 (R. 7). The credit was made on June 28, 1924, which was more than five years after the filing of petitioner's 1917 return (R. 7).

3. The petitioner filed its income tax return for the fiscal year ended July 31, 1917, on April 10, 1918, and paid the tax shown thereon to be due (R. 4).

4. On February 19, 1921, the petitioner filed with the Commissioner of Internal Revenue an unlimited waiver for 1917 which, under the terms of Commissioner's Mimeograph 3085, expired on April 1, 1924 (R. 5).

5. On February 19, 1923, the petitioner filed with the Commissioner of Internal Revenue an uncompleted waiver form, executed by the petitioner, but with the

space left blank for the signature of the Commissioner. This waiver by its terms was unlimited in scope. It opened with the words, "In pursuance of the provisions of subdivision (*d*) of Section 250 of the Revenue Act of 1921, R. H. Stearns & Company, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent * * *" (R. 5).

6. On June 26, 1923, and within the statutory period as extended by the first waiver, the Commissioner of Internal Revenue, disregarding the second waiver which he had not accepted, assessed an additional tax against the petitioner for the fiscal year 1917 in the sum of $22,189.10 (R. 6). On the assessment list was the notation, "7/31/17 Fisc 1753361 O L 4/17/23 Waiver." No proof was offered as to what particular document the word "waiver" had reference (R. 6).

7. A portion of this additional assessment, to wit, $14,928.07, was collected on June 28, 1924 (R. 7). The collection was effected by the credit of the 1918 taxes overpaid (R. 7).

8. On February 21, 1927, this Honorable Court handed down the decision of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346. Prior to that date the Commissioner of Internal Revenue had proceeded upon the assumption that a tax assessed on time could be collected at leisure. In February, 1927, the situation as it existed in the case at bar presented an exact parallel to the *New York & Albany Lighterage Company* case. The assessment had been timely made but the collection was too late.

Accordingly on April 7, 1930, the then Commissioner of Internal Revenue, Robert H. Lucas, who had entered office on June 1, 1929, purported to accept and signed the waiver of February 19, 1923 (R. 6). Thus the date of acceptance and signing was more than seven years after the execution of the waiver by the taxpayer and almost six years after the tax collection which was thereby sought to be validated.

9. On May 20, 1930, the petitioner filed a petition in the Court of Claims demanding the refund to it of the 1918 overassessment of $14,928.07 described in Paragraph 2 above (R. 1-3).

10. Said petition was dismissed by an order of the Court of Claims dated March 13, 1933 (R. 13).

The opinion handed down by the Court of Claims at the time the order dismissing the petition was issued contained the following statements:

> "In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. *But by some mysterious channel,* after six years, the plaintiff learns the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding. No complaint was made while his signature was lacking." (Italics ours.) (R. 12.)

11. On April 6, 1933, the petitioner filed a motion for rehearing (R. 13). Said motion requested the Court of Claims to expunge from the record the state-

ment appearing in the court's opinion that the petitioner had learned of the late signing of the waiver through some mysterious channel. Said motion set out explicitly the source from which the petitioner had derived such information and the method by which it had been secured. Said motion stated further that the language of the court raised an inference of improper conduct on the part of the petitioner and/or its attorneys and tended to bring them into disrepute.

12. The motion of the petitioner in this connection was denied by the Court of Claims on May 8, 1933 (R. 13).

A certified transcript of the record in the Court of Claims, consisting of the pleadings, findings of fact, judgment and opinion of the court, is hereby furnished, attached to and made a part of this application and marked Exhibit "A" in compliance with Rule 38 of this Honorable Court.

The petitioner strongly believes that the remarks in the opinion of the Court of Claims reflecting upon the conduct of the petitioner and/or its attorneys, being entirely without foundation, are unfair and unjust and that the petitioner is entitled to relief therefrom. The petitioner further is advised and also believes that the judgment of the Court of Claims in the case at bar is erroneous. It is accordingly the judgment of the petitioner that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 3 (B) of the Act of February 13, 1925 (43 Stat. 936) and for such other and further relief in the prem-

ises as the circumstances of the case in all fairness warrant.

Questions Involved.

1. May the Court of Claims impute to a petitioner invoking its jurisdiction conduct of highly questionable character when said Court of Claims has before it not one shred of evidence justifying such imputation and when said petitioner has offered to the Court papers and documents conclusively establishing the complete propriety of the petitioner's conduct in the premises?

2. Is a waiver executed by the taxpayer on February 19, 1923, not accepted or signed by the Commissioner of Internal Revenue until April 7, 1930, and then accepted and signed by a Commissioner who entered office only on June 1, 1929, good to validate the collection at June 28, 1924, of a 1917 tax assessed on June 26, 1923?

Reasons Relied on for Allowance of Writ.

1. In rendering its opinion the Court of Claims, manifesting prejudice and malice against the petitioner, cast serious reflection upon the conduct of the petitioner and/or its attorneys. There is nothing in the record or outside of the record in this case to justify the accusation implied. Upon motion of the petitioner the Court of Claims has refused to withdraw its objectionable language. Accordingly the petitioner is without remedy in the premises except by an appeal to the conscience of this Honorable Court.

2. This is a suit for the recovery of a 1918 overpayment credited to a 1917 tax on June 28, 1924, more

than five years after the petitioner's 1917 return was filed. Such credit was valid only if made within the terms of a written consent extending the statute and signed by both the taxpayer and the Commissioner. Section 250 (d) of the Revenue Act of 1921; Section 278 (c) of the Revenue Act of 1924; Section 278 (d) of the Revenue Act of 1926, and Section 506 of the Revenue Act of 1928.

At the time of the collection of the additional tax assessed against the petitioner for the fiscal year 1917, no such written agreement was in existence. If the signing of the waiver by Commissioner Lucas on April 7, 1930, created such an agreement, the consent came into effect after the enactment of Section 1106 (a) of the Revenue Act of 1926, and Sections 506, 607 and 609 (a) of the Revenue Act of 1928, and was rendered inoperative by the terms thereof.

3. The petitioner is informed that this Honorable Court has granted writs of certiorari on motion of the Government in four cases involving questions closely related to that presented by the case at bar. Those cases are now pending before this Honorable Court. They are: *Commissioner* v. *United States Refractories Corporation,* C. C. A., 3rd, decided March 7, 1933 (No. 20, Oct. Term, 1933); *Commissioner* v. *Northern Coal Company,* C. C. A., 1st, decided January 3, 1933 (No. 18, Oct. Term, 1933); *Commissioner* v. *C. H. Sprague & Son Company,* C. C. A., 1st, decided January 3, 1933 (No. 19, Oct. Term, 1933); and *Commissioner* v. *Oswego and Syracuse Railroad Company,* C. C. A., 2nd, decided January 9, 1933 (No. 21, Oct. Term, 1933).

4. The decision of the Court of Claims in this case runs counter to a number of decisions by the Board of Tax Appeals and by the Circuit Courts of Appeal.

5. This question, involving the reality of the consent of the Commissioner and the requirement of the Commissioner's signature, is one of Federal tax law which the petitioner thought had been foreclosed in its favor by prior decisions of this Honorable Court. *Florsheim Bros. Drygoods Company, Ltd.*, v. *United States*, 280 U. S. 453, 466-467; *Aiken* v. *Burnet*, 282 U. S. 277, 281; and *Stange* v. *Commissioner*, 282 U. S. 270, 276. Cases are arising continually in the Courts and before the Board of Tax Appeals involving this issue and, notwithstanding the pronouncements of this Honorable Court in the cases cited above, the language of the various opinions is conflicting and confusing.

WHEREFORE the petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Court of Claims be granted, and that said judgment of the Court of Claims may be reversed by this Honorable Court and that the petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. H. STEARNS COMPANY,
By FREDERICK S. WINSTON,
Attorney for Petitioner.

Of Counsel:
HOWE P. COCHRAN.
WILLIAM N. WOOD.

IN THE

Court of Claims of the United States

R. H. STEARNS COMPANY,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

No. L—187

MOTION FOR LEAVE TO SHOW THE COURT HOW PLAINTIFF CAME INTO POSSESSION OF CERTAIN INFORMATION AND FOR CORRECTION OF THE RECORD.

To the Honorable, the Chief Justice, and the Judges of the Court of Claims:

Comes now the Plaintiff, through its attorneys, HOWE P. COCHRAN, WILLIAM N. WOOD and FREDERICK S. WINSTON, and begs leave of the Court to show how certain information came into its possession and prays the Court to correct the record by eliminating from Page six of its decision, the fol-

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lowing words: "by some mysterious channel" contained in the following sentence:

> "But by some mysterious channel, after six years, the plaintiff learns that the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding."

The facts concerning the channel whereby the Plaintiff came into possession of this information are:

That on February 19, 1923, the Plaintiff herein filed with the Commissioner of Internal Revenue a form of waiver. At that time the Commissioner had not accepted and signed it for it was submitted in blank.

On April 2, 1930, and by reason of the decisions in the New York & Albany Lighterage Company case and other similar cases, among them the Estate of Fleitman, 23 B. T. A. 1418, then pending, and the enactment of Sections 506 and 607, Revenue Act 1928, it became material, as the Plaintiff's attorneys thought, to find out whether or not the above-named waiver form had ever become a consent in writing between the parties, signed by the Commissioner of Internal Revenue or anyone authorized by him.

On April 2nd, 1930, the Plaintiff's attorney, WILLIAM N. WOOD, addressed and forwarded to the Commissioner of Internal Revenue a letter asking him for copies of all waivers filed by the Plaintiff for the years 1917 and 1918.

On April 23, 1930, a photostat of the waiver form in question bearing the name of Robert Lucas showing on its face that it was signed and dated April 7, 1930, was sent to the attorney of the Plaintiff by the Deputy Commissioner of Internal Revenue. Accompanying

said photostat was a bill for seventy-five cents by the Commissioner of Internal Revenue against the attorney for the Plaintiff as a charge for such photostats as were enclosed.

This bill the Plaintiff's attorney duly paid.

Copy of the letter to the Commissioner, his answer, the waiver and the bill from the Commissioner are attached hereto.

From the above it is clear that the information did not reach the Plaintiff through any mysterious channel but in the regular course of business.

At all times the Plaintiff's attorneys have attempted diligently to conduct themselves with such dignity, openess and honesty as the superior standing of this Honorable Court requires them to do, and have attempted always to demean themselves as members of the Bar of this Honorable Court should.

Plaintiff believes and therefore invites the Court's attention to the belief that the language of the Court in this case raises an inference of improper conduct on the part of the Plaintiff and/or its attorneys, and tends to create and promote the idea that the Plaintiff and/or its attorneys have not been conducting themselves as the rules of conduct of this Honorable Court require, or as the standards of their profession and mankind generally require them to do. Whereas, the true facts are that they have in this transaction fulfilled their duty to this Honorable Court and to their client, and have not committed any act which can in any way cast reflection upon them as attorneys or as members of this Bar.

The prayer of the Plaintiff is that the words be stricken from the record; that its rights may not be prejudiced.

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The prayer of the attorneys is that these words be stricken from the record and some public mention made thereof in order that they may not be held up to ridicule and contempt by their fellow lawyers and fellow men.

The Plaintiff's attorneys state that on every hand since the decision they have been chided and criticized for the expression used by the Court; that at the time of attending a hearing before a Commissioner of the Court of Claims in Boston, Massachusetts, on March 22, 1933, persons associated with the Federal Government Tax Department in that matter chided the attorneys for the Plaintiff accusing them of having been chastised by these words of this Honorable Court.

Attorneys for the Plaintiff value their standing in this Court and before the world as members of the Bar of this Court, and they beg this Court to correct the statement in order that their good name and reputation may not be damaged or destroyed.

Respectfully submitted,

WILLIAM N. WOOD,
Attorney for Plaintiff,
Woodward Building,
Washington, D. C.

Of Counsel:
HOWE P. COCHRAN,
FREDERICK S. WINSTON.

April 2, 1930.

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please furnish me with copies of all waivers filed by the R. H. Stearns Company for the years ending July 31, 1917 and July 31, 1918.

Please furnish me with copy of certificate of over-assessment for the year ending July 31, 1918.

Yours very truly,

WNW:MI

WILLIAM N. WOOD.

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TREASURY DEPARTMENT
Washington

Office Of
Commissioner of Internal
Revenue

Address Reply To
Commissioner of Internal
Revenue and Refer to
IT:R:F:G
BMV

APR 23 1930

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Sir:

In accordance with the request contained in your letter dated April 2, 1930, there are enclosed photostat copies of waivers filed by R. H. Stearns Company, 140 Tremont Street, Boston, Massachusetts, for the fiscal years ending July 31, 1917 and July 31, 1918, and a copy of certificate of over-assessment for the fiscal year ending July 31, 1918.

Respectfully,

(Signed) DAVID BURNET,
Deputy Commissioner.

Enclosures.

(1036M)

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Income Tax Unit

RECEIVED
PAYMENT
APR 24 1930
Commissioner of
Internal Revenue.

.....19....	
....Copies Returns @ $1.00	$....
3 Copies Other Papers @ .25	0.75
....Certifications @ .50....	....
AMOUNT DUE	$0.75

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

STAMPS NOT ACCEPTED

Returns of papers furnished

Copies of waivers filed by R. H. Stearns Co., for the years July 31, 1917, and July 31, 1918, and copy of certificate of overassessment for the year July 31, 1918.

Make remittance payable to TREASURER OF THE UNITED STATES and forward to the Commissioner of Internal Revenue, Income Tax Unit, Washington, D. C., attention IT:R. Please return this statement with remittance and the copies of documents listed herein will be forwarded to you.

February 19, 1923.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. STEARNS & COMPANY, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917 and July 31, 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide Revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations, provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive and thorough consideration, and not on superficial determination of the true liability.

R. H. STEARNS & COMPANY,
Taxpayer.
By HENRY W. GIESE, *Treas.*

Attest:
(Signed) Wahlon K. Leighton
Clerk

Signed) Robt. H. Lucas,
ABN Commissioner
April 7, 1930

Affidavit.

HOWE P. COCHRAN, being first duly sworn, deposes and says:

That he is an attorney with offices at 920 Potomac Electric Power Co. Building, Washington, D. C.

That he was one of the attorneys for the petitioner in the case at bar.

That he is familiar with the entire history of the case and he knows of his own knowledge that the facts set out in the foregoing motion are true and that the letters appended thereto are true and exact copies of the originals which passed in due course of business between Mr. William N. Wood and the Treasury Department.

HOWE P. COCHRAN.

Subscribed and sworn to before me this 7th day of June, 1933.

[SEAL.] CHARLES LEO DE ORSEY,
Notary Public.

My commission expires on April 28th, 1935.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

I.

Opinion of the Court Below.

The opinion of the Court of Claims has not been officially reported. It was rendered by the Court below on March 13, 1933, and will be found in the printed record on pages 3-13.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (*b*) of the Act of February 13, 1925 (44 Stat. 936).

The final judgment of the Court of Claims was entered on March 13, 1933, and will be found on pages 3 to 13 of the printed record. The application for writ appended hereto is being filed within ninety days after such date.

This suit brought in the Court of Claims is for the recovery of an overpayment of income taxes for the fiscal year 1918 which was credited to an additional tax for the fiscal year 1917 which in turn was assessed prior to June 2, 1924, and collected more than five years after petitioner's 1917 return was filed. Jurisdiction of such claim is conferred on the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

The Facts.

The facts in the case are printed in the petition and to avoid repetition, counsel begs leave to refer thereto. In its opinion the Court of Claims stated that the petitioner secured certain information in connection with the case through "some mysterious channel." Believing that such language was intended to and did call into question the conduct of the petitioner, and knowing that its conduct was above question, the petitioner seeks the relief of this Honorable Court from what it believes to be the unjust action of the Court of Claims. The further question raised by the case is whether or not a waiver dated February 19, 1923, was effective to validate the collection by credit of a 1917 tax made on

June 28, 1924. For the convenience of the court the facts in outline form are briefly set out below:

1. April 10, 1918.—Petitioner's 1917 return filed (R. 4).

2. February 19, 1921.—First waiver filed effective to April 1, 1924 (R. 5).

3. February 19, 1923.—Execution and submission of second waiver by petitioner. Unlimited in scope (R. 5).

4. April 10, 1923.—Expiration of statutory period except for waivers (R. 8).

5. June 26, 1923.—Additional assessment against the petitioner for the year 1917 made within the statutory period as extended by first waiver (R. 6, 8).

6. April 1, 1924.—Expiration of statutory period as extended by first waiver. Second waiver not yet accepted and signed by Commissioner of Internal Revenue (R. 8).

7. June 28, 1924.—Collection of above-mentioned additional tax by credit. Second waiver not yet accepted and signed by Commissioner (R. 7).

8. February 26, 1926.—Enactment of Revenue Act of 1926 including Section 1106 (*a*). Second waiver not yet accepted and signed by Commissioner.

9. May 28, 1928.—Enactment of Revenue Act of 1928 including Sections 506, 607 and 609 (*a*). Second waiver not yet accepted and signed by Commissioner.

10. June 1, 1929.—David H. Blair was succeeded by Robert H. Lucas as Commissioner of Internal Revenue. Second waiver not yet accepted and signed by Commissioner (R. 6).

11. April 7, 1930.—Waiver of February 19, 1923, accepted and signed by Commissioner Robert H. Lucas (R. 6).

IV.

The Statutes.

The statutes involved in this case are Section 250 (*d*) of the Revenue Act of 1921; Section 278 (*e*) of the Revenue Act of 1924; Section 1106 (*a*) of the Revenue Act of 1926; and Sections 506, 607 and 609 (*a*) of the Revenue Act of 1928.

V.

Specification of Error.

The errors which the petitioner urges as grounds for the granting of the writ of certiorari and for the review and reversal of the decision of the Court of Claims are:

(1) The court below manifested prejudice and malice against the petitioner and included in its opinion remarks which had no basis either in fact or in the record and which were calculated to bring the reputation of the petitioner and/or its attorneys into disrepute.

(2) The court below erred in holding that the waiver of February 19, 1923, was effective to validate the collection by credit of the tax in question on June 28, 1924.

VI.

Summary of Argument.

1. In deciding this case the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source.

2. Commissioner Blair never intended to nor did he accept the waiver of February 19, 1923.

3. At the time the credit was made, collection of this tax was barred.

4. The right of the Government to collect was not revived by later acts of Commissioner Lucas.

(*a*) The liability was extinguished by the 1926 Act.

(*b*) The credit was declared void by the Revenue Act of 1928.

VII.

THE ARGUMENT.

1. In deciding this case, the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source.

Reports are constantly current in Washington with respect to cases secured upon information improperly

divulged by public officer. From the decision rendered by the Court of Claims it would appear that the learned judges composing that tribunal were of opinion that the taxpayer in this case was the beneficiary of such a proscribed source of information. The lower court in its opinion made reference to the origin of petitioner's information relative to the signing of the waiver of February 19, 1923, by Commissioner Lucas on April 8, 1930, as secured through "some mysterious channel".

In a motion for rehearing, a copy of which is attached to and made a part of this brief, the petitioner explained in detail to the Court of Claims the method by which it secured the suspected facts. In such motion the petitioner called the attention of the Court of Claims to the circumstance that its equivocal language tended to bring the reputation of the petitioner and/or its attorneys into disrepute and asked the Court to modify its opinion by striking out the objectionable reference. The Court of Claims denied said motion on May 8, 1933.

It is submitted that if the Court of Claims mistakenly believed that the petitioner had secured information from an improper source, such belief would have tended to prejudice the case of the petitioner in the eyes of said Honorable Court, and thus render that court unable to decide the case upon its merits with minds free from malice and prejudice.

It is submitted further that the Court of Claims transgressed the boundaries of justice and fair dealing in making the reference above referred to and that its refusal to modify its derogatory language re-

quires the petitioner to accept the only recourse that it has and petition this Honorable Court for relief against the unjust animadversion of the court below.

2. Commissioner Blair never intended to nor did he accept the waiver of February 19, 1923.

Two waivers were filed by the taxpayer in this case. The first executed on February 19, 1921, was an unlimited assessment waiver and ran to April 1, 1924. The second was tendered by the taxpayer on February 19, 1923, and by its terms was unlimited in scope.

That Commissioner Blair never intended to accept the tender of the second waiver is evidenced by the facts that he did not sign the same, and that instead he assessed the additional tax well within the terms of the first waiver on June 26, 1923.

Prior to the decision of *Bowers* v. *New York & Albany Lighterage Company* case, 273 U. S. 346, by this Honorable Court, the Treasury Department had made it a practice not to hurry the collection of a tax which had been assessed on time. "This practice", observed Judge Littleton, in his dissenting opinion in *Naumkeag Steam Cotton Company* v. *United States,* decided by the Court of Claims on January 9, 1933, "was founded on Treasury Ruling I. T. 1446, in or about July, 1922, that where a tax had been assessed within the statute of limitations applicable thereto, collection thereof after the expiration of the five years was entirely proper, * * *. This practice was followed whether the tax was collected by credit or by distraint." Accordingly in the instant case, not deem-

ing the second waiver vital in any respect, Commissioner Blair did not accept or sign the same.

That it has been the prevailing view that the consent of the Commissioner was a vital ingredient in a consent to extend the statute is evidenced by the language of a number of decisions: *Greylock Mills* v. *Commissioner,* 31 Fed. (2nd) 655, C. C. A., 2nd; *Sabin* v. *United States,* 44 Fed. (2nd) 70, Court of Claims; *Stern Bros. & Co.* v. *Burnet,* 51 Fed. (2nd) 1042, C. C. A., 8th; *W. P. Brown & Sons Lumber Company* v. *Commissioner,* 38 Fed. (2nd) 425, C. C. A., 6th.

3. At the time the credit was made, collection of this tax was barred.

The first waiver expired on April 1, 1924. At the time of collection on June 28, 1924, no other waiver was in existence. It is true there lay at that date in the files a rejected and unexecuted waiver form, but that was ineffective to validate the collection. *Commissioner* v. *United States Refractories Corporation,* C. C. A., 3rd, decided March 7, 1933, 1933 Commerce Clearing House, Vol. III, Section 9182; *Knight Campbell Music Company* v. *Commissioner,* 23 B. T. A. 1234; *Corn Products Refining Company* v. *Commissioner,* 22 B. T. A. 605; *Thompson* v. *Commissioner,* 18 B. T. A. 1192; *Moore, Adm.,* v. *Commissioner,* 17 B. T. A. 314; *Chadbourne & Moore* v. *Commissioner,* 16 B. T. A. 961.

In other decisions the appellate courts in treating of waivers, have assumed the necessity of a signature by the Commissioner and concerned themselves pri-

marily with what constituted compliance with this requirement. *Trustees for Ohio & Big Sandy Coal Company* v. *Commissioner,* 43 Fed. (2nd) 782, C. C. A., 4th; *United Thacker Coal Company* v. *Commissioner,* 46 Fed. (2nd) 231, C. C. A., 1st; *Liberty Baking Company* v. *Heiner,* 34 Fed. (2nd) 513; District Court, West. Dist. of Penn., affirmed on this point by the C. C. A., 3rd, in 37 Fed. (2nd) 703; *Greylock Mills* v. *Commissioner,* 31 Fed. (2nd) 655 C. C. A., 2nd; *R. V. Board* v. *Commissioner,* 51 Fed. (2nd) 73, C. C. A., 6th; *The Onondaga Company* v. *Commissioner,* 50 Fed. (2nd) 397, C. C. A., 2nd; *Stern Bros. & Company* v. *Commissioner,* 51 Fed. (2nd) 1042, C. C. A., 8th.

In only one circuit has it been viewed as the law that the signature of the Commissioner was unnecessary. *Hind Rolph & Company* v. *Commissioner,* 52 Fed. (2nd) 1075, C. C. A., 9th. And that was a case where the Commissioner accepted and acted on the waiver though he had failed to sign it.

The case of *Marsh* v. *Nichols, Shepard & Company,* 128 U. S. 605, is authority for the principle that when a statute requires an official signature to an instrument, the absence of such signature renders the paper a mere "uncompleted document," ineffectual to confer the rights intended.

Accordingly at the date of the credit, collection of the tax was barred.

4. The right of the Government to collect was not revived by later acts of Commissioner Lucas.

(*a*) *The Liability Was Extinguished by the 1926 Act.*

Whether the right of the Government to collect this tax could later have been revived prior to the passage of the Revenue Act of 1926, it is not necessary to decide. Section 1106 (*a*) of the Revenue Act of 1926 provided that the running of the statute should not only bar the remedy but extinguish the liability. Thereafter the right of the Government lost all power of revival, and the courts have held that waivers given subsequently could breathe no new life into claims which were barred when the 1926 Act was passed. *Commissioner* v. *Northern Coal Company,* and *Commissioner* v. *C. H. Sprague & Son Company,* C. C. A.. 1st decided January 3, 1933, 1933 Commerce Clearing House, Vol. III, Section 9050; *Commissioner* v. *Oswego and Syracuse Railroad Company,* C. C. A., 2nd, decided January 9, 1933, 1933 Commerce Clearing House, Vol. III, Section 9052.

(*b*) *The Credit Was Declared Void by the Revenue Act of 1928.*

Under the terms of Sections 607 and 609 (a) of the Revenue Act of 1928, the credit applying this 1918 overpayment to the barred 1917 tax was void—not voidable but void. Accordingly at the date of passage of that Act, the taxpayer had a vested right to the recovery of the overpayment.

Under such facts the petitioner submits that the action of Commissioner Lucas in signing the waiver of February 19, 1923, on April 7, 1930, was a futile gesture and entirely without effect on the rights of the parties. This Honorable Court has said in *Ballinger* v. *Frost*, 216 U. S. 240 at 249:

> "Whenever in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department."

Furthermore by the express terms of the 1928 Act a waiver is invalid if executed after the expiration of the statutory period. Section 506 of the Revenue Act of 1928.

It is therefore respectfully submitted that this case is one calling for and demanding the exercise by this Court of its supervisory powers in order that there may be a final determination of whether the Court of Claims may:

1. Include in its opinion entirely without justification insinuations derogatory of the character and reputation of a petitioner invoking its jurisdiction, and

2. Deny to such petitioner recovery of an overpayment credited to a 1917 tax which 1917 tax was assessed on June 26, 1923, and collected on June 28, 1924, under a waiver which was never accepted by the Commissioner of Internal Revenue in office at the time of its submission and was only signed by the succeeding Commissioner on April 7, 1930.

And to such ends it is respectfully prayed that a writ of certiorari be granted and that this Court review the decision of the Court of Claims and reverse it, and take such other and further action with respect to the matters complained of as to this Court may seem meet, proper and just.

FREDERICK S. WINSTON,
Attorney for Petitioner.

920 Potomac Electric Power Co. Building, Washington, D. C.

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Supreme Court of the United States

October Term, 1933

No. 133

R. H. STEARNS COMPANY, Boston, Massachusetts,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

BRIEF FOR PETITIONER

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Claims is reported in 2 Fed. Supp. 773.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, (44 Stat. 936).

The final judgment of the Court of Claims was entered on March 13, 1933, and the Petition for a Writ of Certiorari was filed by the petitioner on June 7th, 1933.

III.

THE QUESTIONS INVOLVED

This suit was brought in the Court of Claims for the refund of $14,928.07 income and profits taxes admittedly overpaid for the year 1918. Instead of being refunded to the petitioner this overpayment was credited to an additional tax for 1917 which, according to the view of the petitioner, was barred at the time the credit was made. In order to sustain the validity of the credit, which was made more than five years after the 1917 return was filed, the Government relies upon a certain "waiver" signed by the petitioner on February 19, 1923. The petitioner challenges the effectiveness of this waiver, and it is that point which presents the first issue in this case.

A second point, but in the eyes of the petitioner an equally important one, concerns the propriety of a remark included in the opinion of the Court of Claims and directed at the character and conduct of the petitioner and/or its attorneys.

IV.

THE FACTS

1. The petitioner herein is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. (R. 4)

2. On or after June 28, 1924, the Commissioner of Internal Revenue transmitted to the petitioner a certificate of overassessment for the fiscal year ended July 31, 1918, showing an overpayment of $14,928.07. (R. 9) This overpayment was not refunded, but instead was credited to an additional tax for the fiscal year ended July 31, 1917, (R. 7) which additional tax was assessed on June 26, 1923. (R. 6) The credit was made on June 28, 1924, (R. 7) which

was more than five years after the filing of petitioner's 1917 return. (R. 4)

The collection on June 28, 1924, was more than one year after the date of the assessment (June 26, 1923).

On August 9, 1923, (a date ten months prior to the date of collection above cited) the petitioner filed a claim for refund and credit for the fiscal years 1918, 1919, 1920 and 1921, which were years subsequent to the year 1917 against which the then outstanding assessment of June 26, 1923, had been made. (R. 6)

> "It was the practice in the collector's office at the time this claim for refund and credit was filed, to treat such claims as a stay of collection of the unpaid taxes against which the credit was sought to be applied, until the commissioner had considered and adjusted the claim." (R. 6)

3. The petitioner filed its income tax return for the fiscal year ended July 31, 1917, on April 10, 1918, and paid the tax shown thereon to be due. (R. 4)

4. On February 19, 1921, the petitioner filed with the Commissioner of Internal Revenue a waiver for 1917 which was unlimited in scope, giving the Commissioner of Internal Revenue the right to determine, assess and collect any tax for 1917 irrespective of the statute of limitations. (R. 5)

5. On February 19, 1923, that is to say, two years later, the petitioner filed with the Commissioner of Internal Revenue an uncompleted waiver form for the year 1917, executed by the petitioner, but with the space for the signature of the Commissioner left blank. (R. 5-6) This waiver by its terms required assessments to be made before March 1, 1925. (R. 5) It opened with the words, "In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. Stearns & Company, of Boston,

Massachusetts, and the Commissioner of Internal Revenue, hereby consent * * *" (R. 5).

6. On April 11, 1923, the Commissioner of Internal Revenue then in office, issued a proclamation or statement commonly known as 'Commissioner's Mimeograph 3085', which declared that unlimited waivers for 1917 would be held to expire on April 1, 1924. (R. 5)

7. On June 26, 1923, and within the statutory period as extended by the first waiver (the waiver of February 19, 1921) the Commissioner of Internal Revenue, disregarding the second waiver which he had not signed, assessed an additional tax against the petitioner for the fiscal year 1917 in the sum of $22,189.10. (R. 6) On the assessment list was the notation, "7/31/17 Fisc 1753361 O L 4/17/23 Waiver." No proof was offered as to what particular document the word "waiver" had reference. (R. 6)

8. A portion of this additional assessment, to-wit, $14,928.07, was collected on June 28, 1924. (R. 7) The collection was effected by the credit of the 1918 taxes overpaid. (R. 7)

9. On February 21, 1927, this Honorable Court handed down the decision of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346.

10. On April 7, 1930, the then Commissioner of Internal Revenue, Robert H. Lucas, who had entered office on June 1, 1929, purported to accept and proceeded to sign the waiver of February 19, 1923. (R. 6) This date of 'acceptance' and signing was more than seven years after the execution of the waiver by the taxpayer (Feby. 19, 1923, R. 6) and almost six years after the tax collection which was thereby sought to be validated. (June 28, 1924, R. 7)

11. On May 20, 1930, the petitioner filed a petition in the Court of Claims demanding the refund to it of the 1918 overassessment of $14,928.07 described in Paragraph 2 above. (R. 1-3)

12. Said petition was dismissed by an order of the Court of Claims dated March 13, 1933. (R. 13)

The opinion handed down by the Court of Claims at the time the order dismissing the petition was issued contained the following statements:

> "In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. *But by some mysterious channel,* after six years, the plaintiff learns the commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding. No complaint was made while his signature was lacking." (Italics ours.) (R. 12)

13. On April 6, 1933, the petitioner filed a Motion for Rehearing. (R. 13) Said Motion requested the Court of Claims to expunge from the record the statement appearing in the court's opinion that the petitioner had learned of the late signing of the waiver through some mysterious channel. Said Motion set out explicitly, the source from which the petitioner had derived such information and the method by which it had been secured. Said Motion stated further that the language of the court raised an inference of improper conduct on the part of the petitioner and/or its attorneys and tended to bring them into disrepute.

14. The Motion of the petitioner in this connection was denied by the Court of Claims on May 8, 1933. (R. 13)

V.

THE STATUTES

The statutes involved in this case are Section 250 (d) of the Revenue Act of 1921; Section 278 (e) of the Revenue Act of 1924; Section 1106 (a) of the Revenue Act of 1926;

and Sections 506, 607 and 609 (a) of the Revenue Act of 1928.

VI.

SPECIFICATIONS OF ERROR

The errors in the decision of the Court of Claims of which the petitioner complains, are:

1. The court below erred in holding that a waiver executed by the taxpayer on February 19, 1923, for six years entirely disregarded by the Commissioner of Internal Revenue and not accepted by him until April 7, 1930, and then accepted and signed by a new Commissioner who entered office only on June 1, 1929, was good to validate the collection at June 28, 1924, of a 1917 tax assessed on June 26, 1923.

2. The decision of the court is contrary to the evidence and not supported by the finding of fact.

3. The Court of Claims erred in stating that a benefit flowed to the petitioner by reason of the second waiver, and erred in attributing conduct akin to "laches" to the petitioner, for his suit was timely brought.

4. The court below included in its opinion remarks which had no basis either in fact or in the record and which were calculated to bring the reputation of the petitioner and/or its attorneys into disrepute.

VII.

SUMMARY OF ARGUMENT

1. The Overpayment for the year 1918 was not refunded, but was illegally credited to a barred tax for the year 1917, and is now recoverable under Section 609 of the Revenue Act of 1928.

(a) There was no consent in writing between the Commissioner of Internal Revenue and the taxpayer extending the statute for 1917 far enough to cover the date of the collection.

(b) The Commissioner of Internal Revenue did not enter into the alleged consent, and did not mean to do so.

(c) The Commissioner of Internal Revenue did not rely on any agreement consenting to an extension of the statute far enough to cover the collection in question, and there was no such agreement.

(d) The notation "waiver" on the Assessment Roll cannot be said to refer to the waiver in dispute.

(e) The signing of the waiver form nearly six years too late by a new and different Commissioner of Internal Revenue and just prior to the filing of suit by the petitioner, cannot create a consent going back nearly six years so as to defeat the right of action.

(1) Even if this instrument became a consent, which is denied, it was entered into too late and the statute declares it void.

(2) The waiver under dispute amounts to an unsigned waiver, assuming that the unsigned waiver was purposely unsigned.

2. The decision of the Court of Claims is contrary to the evidence and not supported by the finding of facts.

3. The Court of Claims erred in stating that a benefit flowed to the petitioner by reason of the second waiver, and erred in attributing conduct akin to "laches" to the petitioner, for his suit was timely brought.

4. This is a suit upon an account stated for 1918.

5. In deciding this case the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source. Accordingly in its opinion it included language which gave expression to

this opinion and which was calculated to and did bring the reputation of the petitioner and its attorneys into disrepute. The Court further failed to alter such language in the face of an explanation made by the petitioner which showed conclusively that the sources from which it derived its information were entirely regular and proper.

VIII.

ARGUMENT

1. The Overpayment for the year 1918 was not refunded, but was illegally credited to a barred tax for the year 1917, and is now recoverable under Section 609 of the Revenue Act of 1928.

(a) There was no consent in writing between the Commissioner of Internal Revenue and the taxpayer extending the statute for 1917 far enough to cover the date of the collection.

(b) The Commissioner of Internal Revenue did not enter into the alleged consent, and did not mean to do so.

(c) The Commissioner of Internal Revenue did not rely on any agreement consenting to an extension of the statute far enough to cover the collection in question, and there was no such agreement.

The 1917 tax in question was collected by means of a credit of an agreed 1918 overpayment (R. 7) on June 28, 1924, which date was more than five years after the 1917 return of the petitioner was filed. (R. 4) In this case the Commissioner of Internal Revenue had on file a good waiver of the statute of limitations for 1917 dated February 19, 1921, properly signed, and unlimited in scope. (R. 5)

He had, as a result, until Doomsday to assess and collect the tax in question. It is quite apparent that no new

consent was needed, nor desired, and that a new consent would add nothing to the rights or to the time that the Commissioner of Internal Revenue then had. Accordingly when an unsolicited (R. 7) new consent was tendered to the Commissioner of Internal Revenue on February 19, 1923, and that proposed consent by its terms cut down the Commissioner's time to assess the tax in question from 'forever' to two years from March 1, 1923, (R. 5) he refused to sign it, and did not enter into the proposed consent, for it would have *served only to cut short his time* and not to enlarge it.

Thereafter, and on April 11, 1923, the Commissioner of Internal Revenue by his own act, through a published proclamation, known as 'Commissioner's Mimeograph 3085,' established a time limit on unlimited waivers for 1917, proclaiming that all such waivers should expire on April 1, 1924. (R. 5)

And accordingly, before April 1, 1924, well within the time he himself had set, indeed on June 26, 1923, when he had yet nine months left, the Commissioner of Internal Revenue assessed the tax in question (R. 6) under the old waiver, the one that he had accepted. (R. 9)

From the above it is quite clear that the Commissioner of Internal Revenue relied on the executed waiver of February 19, 1921, and that the waiver of February 19, 1923 never received the approval of the Commissioner, and the Court of Claims erred in drawing other and different conclusions from these facts.

As was said in the case of *Commissioner of Internal Revenue* vs. *United States Refractories Corporation*, 64 F. (2d) 69, decided by the United States Circuit Court of Appeals for the Third Circuit, affirmed by this Honorable Court on October 23, 1933:

> "The Commissioner's failure to sign indicates his failure to agree to an extension. * * * as the statu-

> tory limitation for the collection of taxes is clearly made for the benefit of taxpayers, the Congress may have thought that a taxpayer, when asked to give a waiver for the convenience of the Commissioner and thereby surrender the benefit the statute accords him, *is in a position to impose terms which, before the waiver becomes effective or legal must be acceptable to and agreed upon by the Commissioner.* Otherwise a waiver prepared and signed by the taxpayer alone may waive nothing, in which case, if the waiver be valid on the unilateral signing and on a mere filing, the government might, by the Commissioner's delay, or by his ignorance of its terms, or of its extension, lose the tax. * * *" (Italics ours.)

It will be noted in the case at bar that the waiver in question, namely the waiver of February 19, 1923, cut short the time the Commissioner already had from 'forever' to two years from March 1, 1923. Thus it will be seen that the waiver which the Commissioner refused to sign and accept was just such a waiver as was referred to in the case of *United States Refractories Corporation* (supra) attempting to impose restrictions and limitations on the Commissioner of Internal Revenue which the Commissioner of Internal Revenue was unwilling to accept.

It will be noted in the case at bar that not only was the assessment made under the good waiver of February 19, 1921, but also that the Collector had at that time yet nine months and seven days in which he could legally collect. (June 26, 1923, the date of assessment to April 1, 1924, the end of the statutory period as extended by the valid consent of February 19, 1921, as limited by Commissioner's Mimeograph 3085).

But the Collector failed to collect by or before April 1, 1924, and as a consequence the tax became barred.

(d) The Notation 'Waiver' on the Assessment Roll Cannot Be Said to Refer to the Waiver in Dispute.

It has been urged by the Government, and was one of the

conclusions of the Court of Claims, that the notation on the Assessment Roll—"waiver"—referred to this unexecuted waiver or consent and that, coupled together, the unexecuted consent and the Assessment Roll spell out a good waiver or consent. But in the light of the fact that when the notation was made, at the time of the assessment, (June 26, 1923—R. 6) there was in fact another, different and valid waiver or consent (waiver of February 19, 1921, R. 5), and in the absence of any proof, it seems clear to the petitioner that the waiver referred to on the Assessment Roll was the good waiver, and not the unsigned and unaccepted bad one. Moreover, the Government with all the facts in its possession failed to offer any proof tending to show the waiver referred to was the unsigned second waiver.

It is far more reasonable to conclude that the waiver referred to on the Assessment Roll was the good, binding and subsisting waiver than that it was the rejected offer to make another waiver. The Court of Claims really reached this conclusion in its opinion (bottom of Page R. 9).

(e) The signing of the waiver form nearly six years too late by a new and different Commissioner of Internal Revenue and just prior to the filing of suit by the petitioner cannot create a consent going back seven years so as to defeat the right of action.

It will be noted that when this suit threatened, and only then, a new Commissioner of Internal Revenue, (R. 6) attempted almost six years after the transaction in question was completed (R. 6) to validate the waiver; and it is suggested that he did this only in order to defeat the right of action in this suit, then threatened.

The petitioner believes that the rights of litigants are not to be defeated by any such subterfuge, which amounts

merely to an attempt to make it appear that there was a consent when it is so evident that there was none.

The petitioner believes the question of the validity of such tardy consents is now disposed of by statute and by decisions of this Honorable Court, but even before the enactment of the statute, and the decision of this Court, the matter was considered and resolved in favor of the petitioner's view:

In *Greylock Mills* vs. *Commissioner*, 31 Fed. (2nd) 655, it was said by the Second Circuit:

> "• • • The statute says nothing as to when the Commissioner shall sign, nor as to giving notice when he does so. *If he signs before the taxpayer withdraws his waiver, and before the statutory period for assessment has run,* the waiver is executed as the statute requires. Nothing more is needed to give the waiver validity." (Italics ours.)

(e)(1) Even if This Instrument Became a 'Consent', Which Is Denied, It Was Entered Into Too Late and the Statute Declares It Void.

Moreover, the petitioner believes, and urges, that the Revenue Acts expressly prohibit such tardy 'consents'.

The question of the right to revive taxes barred by the statutory period of limitations by a consent entered into after the passage of Section 1106 of the Revenue Act of 1926 (when the taxes were barred on the date of the passage of the 1926 Act) was passed on by this Honorable Court, on October 23, 1933, in the cases of *Commissioner* vs. *Northern Coal Company*, and *Commissioner* vs. *C. H. Sprague & Sons Compnay*. Nos. 18 and 19. In those cases it was held by the courts below, and affirmed by this Court, that the right could not be revived. Petitioner submits that at the passage of the 1926 Act the taxes in question had been and were barred, and, though collected, had been collected when barred, and that a 'consent' executed in

1930, even if genuine, could not revive them, nor defeat the claim for refund.

(e)(2) The 'Waiver' Under Dispute Amounts to an Unsigned Waiver, Assuming That the Unsigned Waiver was Purposely Unsigned.

The petitioner believes that his case is a better case than that of the ordinary *unsigned* waiver, because there might be cases wherein the Commissioner of Internal Revenue failed to sign a waiver, although he acknowledged it and relied upon it; a question not involved here. In the case at bar there was a signed waiver that the Commissioner acknowledged and relied upon (R. 5), and in addition there was an unsigned one that he had refused and failed to sign. A new Commissioner later signed it, almost on the eve of trial, and almost six years too late. (R. 6)

The petitioner, however, begs leave to point out that if the Commissioner of Internal Revenue can add his signature at any time with retroactive effect no case of an unsigned waiver need ever come to trial, for he could add his signature at the moment the instrument is introduced into evidence.

The question of the validity of an unsigned waiver has recently been passed upon by this Honorable Court in *Commissioner* vs. *United States Refractories Corporation*, No. 20, decided Oct. 23, 1933, wherein it was held in the court below, and affirmed in this Court, that an unsigned waiver is of no effect.

It is submitted that the tax against which the agreed 1918 overpayment was credited was barred and that, as a result, the credit was void, and the 1918 overpayment should be refunded.

2. The Decision of the Court is Contrary to the Evidence and Not Supported by the Findings of Fact.

The cause of the delay of the Collector, described in the

paragraphs above, whereby the timely assessment was collected too late, becomes a vital consideration in view of the Court of Claims' opinion that the delay was caused by reliance on the second waiver—the unsigned waiver of February 19, 1923, the one in dispute here.

The court, however, found as a fact that in August, 1923, (a time when the statute had yet nine months' life under the old waiver, the one of February 19, 1921) certain claims were filed for *other years* (R. 6). The court then found as a fact that the practice was to treat such *claims* as a stay of collection and to delay thereon (R. 6).

The only possible inference or conclusion that could be drawn from the above facts is that the Collector delayed because of the *claims*.

It follows as a necessary conclusion that if he delayed on account of the claims he could not have delayed on account of the waiver.

There was not one scintilla of evidence, and no fact was found, to support the italicized part of the court's opinion reading as follows:—

> " • • • As a result of the filing of the claim, a consideration of which necessitated an examination of plaintiff's returns for four years beginning in 1917 and ending in 1921, *and thus might well have required, and did require, more time than remained until the first waiver expired, it is certainly reasonable to say that in such consideration the commissioner relied upon the second waiver which was then on file.*" (Italics ours.) (R. 9-10.)

If speculation as to the cause of the delay is to be indulged in, and the findings ignored, and the absence of proof excused, then the petitioner submits that it is a well known fact that up to the time that this Honorable Court decided the case of *Bowers* v. *New York & Albany Lighter-*

age Company, 273 U. S. 346, (decided February 1, 1927) the Commissioner of Internal Revenue mistakenly believed that if he assessed on time he could collect at leisure.

Indeed, the Commissioner of Internal Revenue in 1922 issued a ruling known as IT 1446 to that effect, and had it published in his official Internal Revenue Bulletin known as 'Cumulative Bulletin I-2, July-December, 1922' on Page 218. It read in part as follows:

> "This office is of the opinion that the following provision of section 250 (d) of the Revenue Act of 1921:
>
> 'No suit or proceeding for the collection of any such taxes due under this Act or any prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed—'
>
> refers only to judicial proceedings for the collection of such taxes and not to the summary proceeding by means of distraint authorized by sections 3187 to 3209 of the Revised Statutes of the United States.
>
> "As the additional taxes in question were placed on the assessment list under date of February 24, 1922, it will be seen that such taxes were determined and assessed within the five-year period of limitation provided in section 250 (d) of the Revenue Act of 1921, *and that the action of the collector in demanding payment after the expiration of such five years was entirely proper.* If payment of the additional assessment of taxes was not made within the prescribed time, *the collector may proceed by means of distraint to collect such taxes.*" (Italics ours.)

The petitioner submits that the delay was due to reliance on the claims as found in the facts in an erroneous understanding of the principles of law regarding their effect, and was not due to any reliance on an unsigned waiver which the Commissioner of Internal Revenue had failed to accept.

3. The Court of Claims Erred in Stating that a Benefit Flowed to the Petitioner by Reason of the Second Waiver, and Erred in Attributing Conduct Akin to Laches to the Petitioner, for His Suit was Timely Brought.

That part of the opinion of the Court of Claims dealing with alleged benefits obtained by the petitioner as a result of the disputed "waiver", is not supported by evidence or the facts of record, for nothing was done by the respondent in reliance on the "waiver"; and no benefits were granted the petitioner in reliance thereon.

That part of the opinion of the Court of Claims dealing with the question of the time of filing this action is of no avail, because it is submitted that laches is not a defense in a lawsuit for taxes; and that all parties have agreed, and it has been shown, that the action was brought within six years of the allowance of the overpayment and six years of the receipt of the Certificate of Overassessment.

4. This is a Suit Upon an 'Account Stated' for 1918.

The government argues in its brief in opposition to the Petition for Writ of Certiorari that the certificate of overassessment on which the petitioner relies does not amount to an account stated. The certificate of overassessment in the case at bar is identical in every essential particular with that in the case of *Bonwit-Teller Co.* v. *United States,* 283 U. S. 258, and the petitioner respectfully submits that this point, if urged by the Government, falls on authority of that case.

The petitioner accepted as correct the statement of account by the Commissionar for the year 1918 showing his allowance of an overpayment of $14,928.07 for that year, which is the subject of this suit, but insisted, as did the taxpayer in the case of *Bonwit-Teller Co.* supra, that the 1918 overpayment should be refunded instead of credited, inas-

much as the tax for 1917, against which the credit had been made, was barred by the statute of limitations.

Section 609 of the Revenue Act of 1928 expressly declared such credits void and provides for the repayment of money so credited.

At the time of the Commissioner's allowance of the overpayment for 1918, and at all times since, the plaintiff has accepted the correctness of the statement of overpayment for 1918.

The certificate of overassessment, which was mailed to the petitioner following the approval on June 28, 1924, of the schedule allowing the overpayment, states the account for the particular taxable year by showing the total amount of the overpayment allowed. Each taxable year stands alone, *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, and the allowance of an overpayment and the delivery of a certificate of overassessment for a particular taxable year is a statement of the account for such year, and if there is no tax legally due the Government for another taxable year, the statute raises an implied promise to pay the overpayment allowed by the Commissioner and stated in the certificate of overassessment.

5. In Deciding this Case the Court of Claims Apparently Fell into the Error of Assuming that the Petitioner Acquired its Information from an Improper Source. Accordingly in its Opinion it Included Language which Gave Expression to this Opinion and which was Calculated to and Did Bring the Reputation of the Petitioner and Its Attorneys into Disrepute. The Court further Failed to Alter Such Language in the Face of an Explanation Made by the Petitioner which Showed Conclusively that the Sources from which it Derived its Information were Entirely Regular and Proper.

The case at bar presents an angle that seldom occurs in the course of litigation tried by our courts. The Court of Claims in rendering its opinion made reference to the origin of petitioner's information relative to the signing of the waiver of February 19, 1923, by Commissioner Lucas on April 8, 1930, as secured "through some mysterious channel." The implication of this remark is clear. It amounted to the enunciation of a suspicion that the petitioner and/or its attorney had secured certain information from an improper source.

The petitioner cherishes its good name among its associates in business, and before the world. The attorneys for the petitioner value beyond price their standing at the bar and their reputation in the communities in which they live. It is particularly true of the practice of income tax law that an unsullied reputation is a matter of vital concern.

The report and the suspicion exist in almost every corner of the United States that some persons employed in the Bureau of Internal Revenue divulge to attorneys in the practice of income tax law information which it is improper to give out. The motive which is reported to actuate such conduct is either favoritism or other incentives of a more material sort.

The language used by the Court of Claims in this case could reasonably be expected to convey to the public the idea that the petitioner was the beneficiary of such improperly secured information. As a result of such language a serious injury was done to the reputation of the petitioner and its attorneys. This is evidenced by the fact that at the very next trial at which the attorneys for the petitioner appeared they were chided in a public place by Government employees for the rebuke administered to them by the Court of Claims. In many other situations the attorneys for the petitioner are constantly being made

aware of the injury done to them by this remark of the Court of Claims.

Immediately upon the publication of the opinion in this case by the Court of Claims, the petitioner filed a motion with said court respectfully praying for a correction of the record. The motion was denominated a "Motion for Leave to Show the Court How Plaintiff Came into Possession of Certain Information and for Correction of the Record." A copy of said motion is attached hereto, made a part hereof, and marked "Exhibit A."

In this motion the petitioner set out explicitly how the information at issue was secured and emphasized the injury done to it and its attorneys by the unfortunate remarks of the court. This action on the part of petitioner was not in any way challenged by the Government. The Attorney General's Office, representing the Government, interposed no opposition whatever. Yet the Court of Claims adhered to the wording of its original opinion and denied the motion. This Honorable Court has been less unyielding in cases where error has crept into opinions rendered by it. *Weedin* v. *Chin Bow*, 274 U. S. 657; *U. S.* v. *Dublier Condenser Co.*, 289 U. S. 178, and 706.

The petitioner in the case at bar is suing on an account stated. It has no choice of courts in which to sue. Its action must be brought in the Court of Claims. The petitioner feels that it is entitled to bring an action in such court without subjecting itself to the humiliation of unjust reflections upon its conduct.

The attorneys for the petitioner feel that as members of the bar, so long as they conduct themselves properly, they should not only yield but receive respect from the courts before whose bars they appear to plead. The Court of Claims has done a serious injury to them. The injury was uncalled for by any act committed by counsel. Accordingly the petitioner and its attorneys pray this Honorable

Court for such relief as may to it seem meet and just under the circumstances.

That this court can, if it so desires, act in the premises is beyond question. It has only recently seen fit to admonish courts of high jurisdiction as to the propriety of certain lines of conduct. *Quercia* v. *U. S.*, 289 U. S. 466; *Johnson* v. *Manhattan Ry. Co. et al*, 289 U. S. 479.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that the decision of the Court of Claims should be reversed and such other and further relief accorded to the petitioner as seems to this Honorable Court appropriate under the circumstances.

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE

Court of Claims of the United States

R. H. STEARNS COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. L—187

MOTION FOR LEAVE TO SHOW THE COURT HOW PLAINTIFF CAME INTO POSSESSION OF CERTAIN INFORMATION AND FOR CORRECTION OF THE RECORD.

To the Honorable, the Chief Justice, and the Judges of the Court of Claims:

Comes now the Plaintiff, through its attorneys, HOWE P. COCHRAN, WILLIAM N. WOOD and FREDERICK S. WINSTON, and begs leave of the Court to show how certain information came into its possession and prays the Court to correct the record by eliminating from Page six of its decision, the following words: "by some mysterious channel" contained in the following sentence:

"But by some mysterious channel, after six years, the plaintiff learns that the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the undersanding."

The facts concerning the channel whereby the Plaintiff came into possession of this information are:

That on February 19, 1923, the Plaintiff herein filed with the Commissioner of Internal Revenue a form of waiver. At that time the Commissioner had not accepted and signed it for it was submitted in blank.

On April 2, 1930, and by reason of the decisions in the New York & Albany Lighterage Company case and other similar cases, among them the Estate of Fleitman, 23 B. T. A. 1418, then pending, and the enactment of Sections 506 and 607, Revenue Act 1928, it became material, as the Plaintiff's attorneys thought, to find out whether or not the above-named waiver form had ever become a consent in writing between the parties, signed by the Commissioner of Internal Revenue or anyone authorized by him.

On April 2nd, 1930, the Plaintiff's attorney, WILLIAM N. WOOD, addressed and forwarded to the Commissioner of Internal Revenue a letter asking him for copies of all waivers filed by the Plaintiff for the years 1917 and 1918.

On April 23, 1930, a photostat of the waiver form in question bearing the name of Robert Lucas showing on its face that it was signed and dated April 7, 1930, was sent to the attorney of the Plaintiff by the Deputy Commissioner of Internal Revenue. Accompanying said photostat was a bill for seventy-five cents by the Commissioner of Internal Revenue against the attorney for the Plaintiff as a charge for such photostats as were enclosed.

This bill the Plaintiff's attorney duly paid.

Copy of the letter to the Commissioner, his answer, the waiver and the bill from the Commissioner are attached hereto.

From the above it is clear that the information did not reach the Plaintiff through any mysterious channel but in the regular course of business.

At all times the Plaintiff's attorneys have attempted diligently to conduct themselves with such dignity, openness and honesty as the superior standing of this Honorable Court requires them to do, and have attempted always to demean themselves as members of the Bar of this Honorable Court should.

Plaintiff believes and therefore invites the Court's attention to the belief that the language of the Court in this case raises an inference of improper conduct on the part of the Plaintiff and/or its attorneys, and tends to create and promote the idea that the Plaintiff and/or its attorneys have not been conducting themselves as the rules of conduct of this Honorable Court require, or as the standards of their profession and mankind generally require them to do. Whereas, the true facts are that they have in this transaction fulfilled their duty to this Honorable Court and to their client, and have not committed any act which can in any way cast reflection upon them as attorneys or as members of this Bar.

The prayer of the Plaintiff is that the words be stricken from the record; that its rights may not be prejudiced.

The prayer of the attorneys is that these words be stricken from the record and some public mention made thereof in order that they may not be held up to ridicule and contempt by their fellow lawyers and fellow men.

The Plaintiff's attorneys state that on every hand since the decision they have been chided and criticized for the expression used by the Court; that at the time of attending a hearing before a Commissioner of the Court of Claims in Boston, Massachusetts, on March 22, 1933, persons associated with the Federal Government Tax Department in that matter chided the attorneys for the Plaintiff accusing

them of having been chastised by these words of this Honorable Court.

Attorneys for the Plaintiff value their standing in this Court and before the world as members of the Bar of this Court, and they beg this Court to correct the statement in order that their good name and reputation may not be damaged or destroyed.

Respectfully submitted,

WILLIAM N. WOOD,
Attorney for Plaintiff,
Woodward Building,
Washington, D. C.

Of Counsel:
HOWE P. COCHRAN,
FREDERICK S. WINSTON.

April 2, 1930.

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please furnish me with copies of all waivers filed by the R. H. Stearns Company for the years ending July 31, 1917, and July 31, 1918.

Please furnish me with copy of certificate of over-assessment for the year ending July 31, 1918.

Yours very truly,

WNW:MI

WILLIAM N. WOOD.

TREASURY DEPARTMENT
Washington ,

Office Of
Commissioner of Internal
Revenue

Address Reply To
Commissioner of Internal
Revenue and Refer to
IT:R:F:G
BMV

APR. 23, 1930.

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Sir:

In accordance with the request contained in your letter dated April 2, 1930, there are enclosed photostat copies of waivers filed by R. H. Stearns Company, 140 Tremont Street, Boston, Massachusetts, for the fiscal years ending July 31, 1917, and July 31, 1918, and a copy of certificate of over-assessment for the fiscal year ending July 31, 1918.

Respectfully,

(Signed) DAVID BURNET,
Deputy Commissioner.

Enclosures.

(1036M)

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Income Tax Unit

RECEIVED
PAYMENT
APR. 24, 1930
Commissioner of
Internal Revenue.

.....19....	
....Copies Returns @ $1.00	$....
3 Copies Other Papers @ .25	0.75
....Certifications @ .50....	....
AMOUNT DUE	$0.75

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Returns of papers furnished

Copies of waivers filed by R. H. Stearns Co., for the years July 31, 1917, and July 31, 1918, and copy of certificate of over-assessment for the year July 31, 1918.

STAMPS NOT ACCEPTED

Make remittance payable to TREASURER OF THE UNITED STATES and forward to the Commissioner of Internal Revenue, Income Tax Unit, Washington, D. C., attention IT:R. Please return this statement with remittance and the copies of documents listed herein will be forwarded to you.

February 19, 1923.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. STEARNS & COMPANY, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917, and July 31, 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide Revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations, provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive and thorough consideration, and not on superficial determination of the true liability.

R. H. STEARNS & COMPANY,
Taxpayer.
By HENRY W. GEISE, *Treas.*

Attest:

(Signed) Wahlon K. Leighton
Clerk

(Signed) Robt. H. Lucas,
ABN Commissioner
April 7, 1930.

Affidavit.

HOWE P. COCHRAN, being first duly sworn, deposes and says:

That he is an attorney with offices at 920 Potomac Electric Power Co. Building, Washington, D. C.

That he was one of the attorneys for the petitioner in the case at bar.

That he is familiar with the entire history of the case and he knows of his own knowledge that the facts set out in the foregoing motion are true and that the letters appended thereto are true and exact copies of the originals which passed in due course of business between Mr. William N. Wood and the Treasury Department.

HOWE P. COCHRAN.

Subscribed and sworn to before me this 7th day of June, 1933.

[SEAL.] CHARLES LEO DE ORSEY,
Notary Public.

My commission expires on April 28th, 1935.

STATUTES INVOLVED

Revenue Act of 1921, Section 250 (d):

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: Provided, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: Provided further, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: Provided further, That in cases coming within the scope of paragraph (9) of subdivision (a) of section 214, or of paragraph (8)

of subdivision (a) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision.

"If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: Provided, That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."

Revenue Act of 1924, Section 278 (e):

"This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Revenue Act of 1926, Section 1106 (a):

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Revenue Act of 1928, Section 506:

"(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.'

'(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before

the expiration of the period previously agreed upon.'

"(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

'(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929.'

"(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed."

Revenue Act of 1928, Section 607:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Revenue Act of 1928, Section 609 (a):

"Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607."

RULINGS INVOLVED

Commissioner's Mimeograph 3085:

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., April 11, 1923.

Unlimited waivers for 1917 income taxes held to expire April 1, 1924.

To collectors of internal revenue, internal revenue agents in charge, and others concerned:

The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

D. H. Blair, Commissioner."

I. T. 1446:

Revenue Act of 1921.

"The income tax return of the M Company was filed February 27, 1917. Notice and demand for additional income taxes due for the year 1916 was mailed by the collector on March 1 and received on March 2, 1922.

"Second notice and demand for the tax was sent on March 10, 1922. The collector has notified the corporation that if the taxes are not paid, he will distrain its property.

"Under the provisions of section 250 of the Revenue Act of 1921, taxes for years prior to 1921 must be determined and assessed within five years after the return was filed, and no suit or proceeding for the collection of the tax may be begun after the expiration of such five years. It is contended that in this case neither of these requirements of the statute has been

met, and request is made that the collector be instructed to refrain from distraining the property.

"This office is of the opinion that the following provision of section 250 (d) of the Revenue Act of 1921:

> 'No suit or proceeding for the collection of any such taxes due under this Act or any prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed—'

refers only to judicial proceedings for the collection of such taxes and not to the summary proceeding by means of distraint authorized by sections 3187 to 3209 of the Revised Statutes of the United States.

"As the additional taxes in question were placed on the assessment list under date of February 24, 1922, it will be seen that such taxes were determined and assessed within the five-year period of limitation provided in section 250 (d) of the Revenue Act of 1921, and that the action of the collector in demanding payment after the expiration of such five years was entirely proper. If payment of the additional assessment of taxes was not made within the prescribed time, the collector may proceed by means of distraint to collect such taxes."

FILE COPY

NOV 17 1933

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY,
Boston, Massachusetts,
Petitioner,

v.

THE UNITED STATES
Respondent.

REPLY BRIEF

FOR PETITIONER

FREDERICK S. WINSTON,
Attorney for Petitioner,
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Washington, D. C.

HOWE P. COCHRAN,
WILLIAM N. WOOD,
JAMES S. Y. IVINS,
MARION P. WORMHOUDT,
RICHARD B. BARKER.
Of Counsel.

PRESS OF GIBSON BROS., INC., 1312 EYE STREET N.W., WASHINGTON, D. C.

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OTHER AUTHORITIES CITED

Bigelow on Estoppel, Sixth Edition 5, 8
Everest "The Law of Estoppel" 5
Ewart "Estoppel" 5
Herman "Estoppel and Res Adjudicata", Vol. II 8
Wood on Limitations 15
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In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, *Petitioner,*

v.

THE UNITED STATES

REPLY BRIEF FOR PETITIONER

POINT I

The Filing of the Claim for Credit Did Not Extend the period of the Statute of Limitations Nor Estop the Taxpayer from Relying on Sections 607 and 609 of the Revenue Act of 1928.

The Bureau of Internal Revenue, during the years 1923 and 1924, labored under two grave errors of law.[1] In the first place it believed that the statute of limitations, while it prevented collection by suit after five years, did not prevent collection

[1] Cf. Gott v. Live Poultry Transit Co., 153 Atl. 801.

by distraint.[2] That error on the part of the Bureau continued until this Court decided *Bowers* v. *New York & Albany Lighterage Co.* (273 U. S. 346) on February 21, 1927, and reversed *Toxaway Mills* v. *United States* (273 U. S. 781) on March 14, 1927. In the case at bar as in the *New York & Albany Lighterage Company* case, the deficiency tax for 1917 was assessed before the expiration of the statutory period of limitations.[3] In each case collection was made after the expiration of the statutory period.[4] The real reason why the Bureau of Internal Revenue allowed the statutory period for collection to lapse was the same in both cases—its erroneous belief that the statute did not limit the time for collection where assessment had been duly made.

The second error under which the Bureau of Internal Revenue labored during the years 1923 and 1924 was that which was reversed by this Court on March 1, 1926 in *Girard Trust Co., et al.* v. *United States* (270 U. S. 163). The Bureau thought that when the Commissioner first scheduled an overassessment to the Collector that constituted an "allowance" of the claim for refund or credit. Accordingly, when the overassessment was sched-

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2 In September, 1922 the Bureau published I. T. 1446 (I-2 C. B. 218) quoted in full on page 15 of our original brief, and in 1925 it was upheld by the Court of Claims which decided that if taxes originally due were collected after the expiration of the five-year statutory period, they could not be recovered back by the taxpayer. *Toxaway Mills v. United States*, 61 Ct. Cl. 363, 372.

3 As extended in this case by the first waiver.

4 Assuming, arguendo, that the second waiver was not valid. See Point III below and pp. 8-15 of petitioner's brief in chief.

uled on March 1, 1924, the Bureau believed that the credit had been allowed and the 1917 deficiency tax in effect collected—a full month before the expiration of the period for assessment as extended by the first waiver. Therefore, even if we assume that the Bureau was not misled by its first error, it is clear that it believed that the collection of the 1917 tax, effected by the scheduling of the overassessment for the later years, was within the statutory period of limitation as extended by the first waiver.

In the light of these facts, it is difficult to take stock in the suggestion contained in the Government's brief that the fatal delay in the final scheduling of refunds and credits on June 28, 1924 was proximately occasioned by the filing of a claim for credit on August 9, 1923, and that if the Collector had not regarded that claim for credit as extending the statutory period, the deficiency tax for 1917 would have been collected before April 1, 1924.

It is probably true that, under the established Bureau practice, where claims for credit were filed, collection of deficiences was postponed pending investigation of the claims for credit. But that does not mean that when a taxpayer filed a claim for credit he consented thereby to the extension of the statutory period for collection of deficiencies, nor was it a representation which would constitute a basis for estoppel.

It may be true, as is urged on page 9 of the Government's brief, that

> "The Collector's notice and demand on August 3, 1923 would plainly have resulted in a

timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed his claim for credit."

But that does not justify the Government's position that, once a claim for credit was filed, the Commissioner could take twenty years, if he saw fit, in which to act upon said claim, while interest would be accruing at 6 percent on the deficiency during the entire period of his delay, so that, if the claim for credit were eventually disallowed, the taxpayer's debt to the Government on the deficiency might be doubled or trebled by accumulated interest. If the filing of the claim for credit did not extend the Commissioner's time indefinitely, it did not extend it at all. The Commissioner actually needed no extension of time[5] as is demonstrated by the fact that he acted on the claim for credit and certified the overassessment to the Collector on March 1, 1924, and there is nothing in the record to show any reason why the Collector could not have made his adjusting entries and returned his schedule to the Commissioner on March 12 instead of on June 12, and accordingly why the Commissioner could not have signed the schedule of refunds and credits by March 28 instead of on June 28, 1924.

In the light of the Bureau's errors of law and the practices based thereon, we believe that the Government's assertion of estoppel in this case is ill

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[5] The statements in the opinion of the Court of Claims (R. 9-10) and the Government's brief (pp. 10-11) to the contrary nothwithstanding.

founded. The Government bases its estoppel theory upon the decision of the Court of Claims in *Naumkeag Steam Cotton Co.* v. *United States* (2 Fed. Supp. 126). The decision in that case is not yet final, for, although this Court denied the plaintiff's petition for a writ of certiorari on May 15, 1933, it extended the plaintiff's time to file a motion for reconsideration and now has such a motion pending before it. It is respectfully submitted that the Court of Claims erred in its decision in the *Naumkeag Steam Cotton Company* case and that the dissenting opinion of Judge Littleton (2 Fed. Supp. 140) is better reasoned.

In general, the cases in which the courts have applied the doctrine of estoppel in pais fall into two categories: (a) those where the estoppel is based upon misrepresentation, and (b) those where estoppel is based upon waiver or agreement. It is clear that in the instant case there is no basis for estoppel by misrepresentation because misrepresentation must be of a past or existing fact.[6] The representation must have been known, by the one making it, to be false, and the person relying upon it must have believed it to be true and have been reasonable in that belief. The Government does not claim to be able to spell any misrepresentation out of the documents filed by the taxpayer or the taxpayer's conduct.

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6 *Henshaw, et al.* v. *Bissell,* 18 Wall. 255, 271; *Brant* v. *Virginia Coal & Iron Co., et al.,* 93 U. S. 326 at 335; *Insurance Company* v. *Mowry,* 96 U. S. 544; Bigelow on Estoppel, Sixth Edition, pp. 636-637; Everest "The Law of Estoppel," p. 251; Ewart "Estoppel," pp. 68-72.

Where estoppel is based upon waiver or agreement, the courts will not apply it to enlarge upon a method specifically provided by statute. For example, one who states that he will not plead the statute of frauds against an oral contract for the sale of land cannot be held estopped from pleading the statute of frauds, for the very purpose of the statute of frauds would be defeated were the doctrine of estoppel applied. Similarly, where the revenue act provided that a tax case might be finally closed by an agreement signed by the taxpayer and by the Commissioner of Internal Revenue and the Secretary of the Treasury, this Court held that a letter signed only on behalf of the taxpayer did not estop the taxpayer from further pressing a claim, saying:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[7]

The revenue acts have consistently provided a bar against assessment or collection after the stated periods ***unless both the Commissioner and the taxpayer have consented in writing*** to a later assessment or collection.[8] The indication of one method

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[7] *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289.; *Smith* v. *Stevens*, 10 Wall 321, 326.

[8] Revenue Act of 1921, Section 250 (d); Revenue Act of 1924, Section 278 (c) and (d); Revenue Act of 1926, Section 278 (c) and (d) (cf. Reveune Act of 1928, Section 506); Revenue Act of 1928, Section 276 (b) and (c); Revenue Act of 1932, Section 276 (b) and (c).

of extending the period of limitations is just as definite and just as exclusive as was the indication of one method of closing cases in the statute considered in the *Botany Worsted Mills* case.

Certainly no promise of indulgence can be spelled out of the claim for credit. In the case of *Andreae* v. *Redfield* (98 U. S. 225) where the shoe was on the other foot, the taxpayer had more reason to expect indulgence from the Treasury than, in the instant case, the Treasury had to expect indulgence from the taxpayer. But this Court in an elaborate opinion held that there could be no estoppel, saying (p. 238):

> "Give the allegations the broadest signification the language employed will justify, and it is clear that the conversations attributed to the Secretary of the Treasury and the officers of the custom-house do not amount to a contract or promise that the statute of limitations should cease to run in any contingency, whether the complainants did or did not cause their claims to be prepared and presented to the Treasury Department for adjustment and allowance."

In that case the court pointed out that immediately after the acts relied on as a basis of estoppel the taxpayer was at liberty to commence suit, having made no contract not to do so. Similarly, in the case at bar, immediately after the filing of the claim for credit, the Collector of Internal Revenue was at liberty to collect the 1917 deficiency tax by distraint or by court proceeding, and was under in-

structions from Washington not to regard the claim as preventing collection.[9]

The Court of Claims did not find that the taxpayer intended the claim for credit to constitute a waiver of the statutory period of limitations. "A waiver is an intentional relinquishment of a known right."[10] Any suggestion that the taxpayer intended the claim for credit as a waiver is refuted by the fact that the taxpayer had already filed one waiver which had been signed by the Commissioner and was still in effect, and had tendered to the Commissioner another waiver which the Commissioner had refused to sign. The presentation of these formal waivers on blanks furnished by the Bureau of Internal Revenue shows clearly that the taxpayer was aware of the formalities necessary to an effective and proper waiver. Accordingly it cannot be doubted that had the taxpayer intended to make further waiver at the time it filed its claim for credit, it would have submitted a formal document similar to the two previously submitted waivers, and would not have left its intention to be implied from the fact of the filing of a claim for credit.

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9 I. T. 1373 (I-1 C. B. 318), which reads:

> "The filing of a claim for credit does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax from being jeopardized. He may, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

10 Herman "Estoppel and Res Adjudicata," Vol. II, pp. 954-955. § 825; Bigelow on Estoppel, Sixth Edition, p. 720.

Any argument that the claim for credit constituted a request for suspension of the statute of limitations because of the Bureau's practice, must necessarily fail unless it is shown that the taxpayer was aware of a Bureau practice which treated claims for credit as necessarily suspending the statute of limitations. The Bureau of Internal Revenue, in a ruling published in 1929, held that a claim for credit could not be construed as a waiver,[11] and acquiesced in the decision of the District Court for the Northern District of Ohio, Eastern Division, in *National Tool Co.* v. *Routzahn*, 28 Fed. (2d) 914, quoting that portion of the court's opinion which says:

> "I do not think that the taxpayer by claiming credit for taxes due for the years 1916 and 1917 against an overpayment for the year 1918, as an inducement to the Collector not to distrain, constituted a waiver of the statute of limitations nor an estoppel from claiming the benefit of that statute."

and the reasons given by the court for that view.

In the case at bar the Court of Claims did not base its decision upon estoppel. The only case in which a claim for credit has been held to work an estoppel or constitute a waiver is the *Naumkeag Steam Cotton Company* case which, as pointed out above, is still before this Court on the question of whether certiorari should be allowed. In addition to that case the Government relies on *Ralston*

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[11] G. C. M. 5739, VIII-1 C. B. 127.

Purina Co. v. *United States* (75 Ct. Cl. 525, certiorari denied 289 U. S. 732), but in that case the Court of Claims was careful to distinguish "the ordinary case where the taxpayer files the usual claim for credit" [the case at bar] and based its decision upon a telegram which it held to constitute an agreement, continuing: "The telegram in this case was not a claim for credit but was directed primarily to the collection of the additional tax for 1918.". The implication in the *Ralston Purina* case was that an ordinary claim for credit would *not* estop the taxpayers from pleading the statute of limitations.

The Government also cites *Backus* v. *United States* (75 Ct. Cl. 69, certiorari denied 288 U. S. 610), but that case is beside the point for the reason that it involved a compromise agreement in the form of a stipulation of facts and law signed by both parties agreeing to the entry of a consent decree by the Board of Tax Appeals. The *ratio decidendi* was not estoppel in pais but estoppel by judgment—*res adjudicata* and the finality of a consent decree.

The point in *Daube* v. *United States*, 75 Ct. Cl 633, relied on by the Government, was decided on the ground that the peculiar credit there involved (A's overpayment against B's deficiency) was not the kind of credit referred to in section 609 of the Revenue Act of 1928. The case is, of course, entirely inapplicable here.

While arguing that the taxpayer waived the statute of limitations or must be estopped to plead it, the Government in its brief makes the wholly

inconsistent argument[12] that the statute of limitations, contained in Section 250 (d) of the Revenue Act of 1921, had no application to collection by credit. This argument is, of course, exactly contrary to the position taken by the Government and sustained by this Court[13] when taxpayers were claiming that a credit was not a payment.

It is clear that the Bureau of Internal Revenue was not misled by the taxpayer, but it seems more than possible that the taxpayer was misled by the Bureau of Internal Revenue into the belief held by the Bureau prior to the decision in *Bowers* v. *New York & Albany Lighterge Co., supra,* and that for for that reason the taxpayer paid the balance of deficiency taxes for 1917 on September 15, 1924 in response to the Collector's notice and demand of September 1, 1924. In any event the taxpayer had no choice, upon receiving the Collector's notice and demand, but to pay the amount demanded[14]. This payment being *in invitum*, cannot be considered as an acquiescence in any of the actions of the Commissioner, nor as a basis for estoppel[15]. The Government's inference[16] from the fact that this payment was made without protest ignores the provision of the Revenue Act of 1924 (Section 1014 (a)) which eliminated all reason for protest in paying taxes, whether believed to be invalid or not.

12 Brief, p. 10.

13 *Graham* v. *Goodcell*, 282 U. S. 409 at 424; *Parks & Woolson Machine Co., v. United States*, 28 Fed. (2d) 868, Cert. den. 279 U. S. 634.

14 R. S. § 3224, U. S. C. tit. 26 § 154; *Graham* v. *du Pont*, 262 U. S. 234.

15 Cf. *Essex Coal Co.* v. *Commissioner*, 39 Fed. (2d) 892, 894.

16 Brief, p. 9.

In order to avoid the effect of Sections 607 and 609 of the Revenue Act of 1928, the Government is attempting to amend the latter by inserting phraseology which Congress never enacted. According to the Government's contention[17], this section should read as follows:[18]

> "(a) Credit against barred deficiency.—Any credit, *made by the Commissioner on his own motion but excluding any credit heretofore made pursuant to the express request of the taxpayer*, against a liability in respect to any taxable year shall be void if any payment in respect to such liability would be considered an overpayment under Section 607.
>
> "(b) * * *
>
> "(c) Application of section.—The provisions of this section shall apply to any credit made *by the Commissioner on his own motion* before or after the enactment of this act, *except credits made before the enactment of this act pursuant to the express request of the taxpayer.*"[19]

In *Graham* v. *Goodcell* (282 U. S. 409 at 424) the taxpayers were requesting the court to read into Section 611 exactly the same kind of language that the Government is now trying to read into Section 609, and the court refused, saying:

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17 Brief, p. 12.

18 The portions of these quotations in Roman type are the statute as enacted. The Italicized words are the Government's amendments.

19 Cf. dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Co.* v. *United States*, 2 Fed. Supp., 152.

"* * * * We see no reason for taking such a case out of the statute."[20]

We pray the Court to bear in mind the fact that when Sections 607 and 609 were put into the Revenue Act of 1928, Congress also enacted Section 611 making a single exception in cases where collections had been stayed by claim in abatement. If Congress had intended to except claims for credit also, it would have said so. It certainly had the existence of claims for credit in mind—for it simultaneously enacted Section 609. When the Revenue Act of 1932 was before Congress, the Senate, at the instance of the Treasury Department, inserted an amendment (No. 262) reading:

> "Sec. 1107. *Credit of Overpayments.*—
> (a) If any internal-revenue tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim was filed, or a request in writing made, for a credit against the tax so assessed of an amount claimed as an overpayment of internal-revenue tax, and if collection of any part of the tax so assessed was postponed, then (1) a credit (made prior to May 29, 1928) against the tax so assessed shall not be considered as void under the provisions of section 609(a) of the revenue act of 1928, relating to erroneous credits, and (2) the payment (made prior to May 29, 1928) of the part of the tax, the payment of which was so postponed, shall not be considered as an overpayment under the pro-

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20 Cf. *United States* v. *Temple*, 105 U. S. 97, 99; *Faw* v. *Marsteller*, 2 Cranch 10, 23.

visions of section 607 of the revenue act of 1928, relating to payments made after the expiration of the period of limitation on assessment and collection.

(b) As used in subsection (a), the term 'tax' includes any interest, penalty, additional amount, or addition to any internal-revenue tax."[21]

But when the bill went to conference this section was striken out and the Treasury's suggestion thus rejected. The effect of this amendment, if it had been adopted, would be identical with the effect of the language the Government is now trying to persuade this Court to insert in Section 609 of the Revenue Act of 1928 by interpretation. The fact that the Treasury Department recognized the necessity for an amendment to accomplish this purpose and the fact that Congress refused to enact it are significant.

POINT II

This Suit is Not Barred by Laches

The Court of Claims in its opinion and the Government, in its brief, indicate that because the taxpayer waited *almost* six years before bringing suit, it should be barred. Perhaps it would be fair to inquire how far a taxpayer would get with a plea that the Government was barred in some case because it did not assess or collect a tax until the statutory period had *almost* elapsed. Suits for refund of

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21 H. R. 10236, Senate print of May 9, 1932, p. 338.

taxes just as much as suits for collection of taxes, are proceedings in law, not in equity, and the doctrine of laches has no application[22].

POINT III

The Second Waiver Filed by the Taxpayer Was Not Valid

As pointed out in our brief in chief, the signature of the Commissioner on April 7, 1930 was too late to make the second waiver effective. The Government in reply[23] urges that regardless of the Commissioner's signature, this waiver constitutes an estoppel against the taxpayer. In other words, the Commissioner could refuse to accept a waiver as a waiver but at the same time rely on it as the basis of an estoppel having the same effect as a waiver. The Commissioner, at the time it was tendered, refused to accept the disadvantages which would have accrued to him upon signing the second waiver, but now (through the process of calling it an estoppel) wants to claim the advantages just as if he had signed it.

Further, as we have pointed out under Point I above, the statute makes definite provision for the method in which the statute of limitations may be extended, and no other method is permissible. If the waiver is not valid as a formal waiver, it is of no effect for any purpose.

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22 Wood on Limitations, p. 287.
23 Brief, p. 14.

POINT IV

This Suit is Not Barred by the Provisions of Section 3226 of the Revised Statute

The Government's brief urges that the taxpayer may not recover because its suit is upon an account stated and the account shows no balance in favor of the petitioner.

The taxpayer submits that its suit is not barred by the statute of limitations since the facts in the case show not only an account stated for the fiscal year 1918 but a determination of an overpayment of 1918 taxes by the Commissioner of Internal Revenue as evidenced by the certificate of overassessment for said year.

As stated in our brief in chief each taxable year stands alone. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301. The allowance of an overpayment and the delivery of a certificate of overassessment for a particular taxable year is a statement of the account for such year. In the present case the account between the taxpayer and the Commissioner for the year 1918 shows an undisputed overpayment and balance of $14,928.07 for the year 1918 which the Commissioner was obligated to pay the taxpayer by way of a *valid* credit or a refund.

But whether or not the situation raised by the facts in this case could be called an "account stated," the taxpayer is nevertheless clearly entitled to recover because of the determination of

an overpayment by the Commissioner as evidenced by the certificate of overassessment delivered to the taxpayer, coupled with the erroneous crediting of the overpayment determined to be due the taxpayer. *Bonwit Teller & Co.* v. *The United States*, 283 U. S. 258, so held in words which cannot be misinterpreted.

The case is so similar to the case of *Bonwit Teller & Co.* v. *The United States* that it can fairly be said to be identical except for the figures involved. This can be demonstrated by parallel columns:

Bonwit Teller Case	*Stearns Case*
The taxpayer filed a claim for refund of fiscal 1919 taxes within the statutory period.	The taxpayer filed a claim for refund of fiscal 1918 taxes within the statutory period.
Commissioner of Internal Revenue determined that taxpayer had overpaid fiscal 1919 taxes in the sum of $10,866.43, and issued and delivered to petitioner a certificate of overassessment for that amount.	Commissioner of Internal Revenue determined that taxpayer had overpaid fiscal 1918 taxes in the sum of $14,928.07, and issued and delivered to petitioner a certificate of overassessment for that amount.
$9,846.06 of the certificate of overassessment was not refunded to the taxpayer, but was credited against a tax which the Commissioner claimed was then due for the year 1917.	$14,928.07 of the certificate of overassessment was not refunded to the taxpayer but was credited against a tax which the Commissioner claimed was then due for the fiscal year 1917.

The crediting of said amount was shown on the certificate of overassessment.	The crediting of said amount was shown on the certificate of overassessment.
The collection of the 1917 tax was barred by the Statute of Limitations when the credit was made.	The collection of the 1917 tax was barred by the Statute of Limitatations when the credit was made.
Suit was brought in the Court of Claims to recover the sum so misapplied.	Suit was brought in the Court of Claims to recover the sum so misapplied.
This suit was brought within six years from the date of delivery of the certificate of overassessment to petitioner.	This suit was brought within six years from the date of delivery of the certificate of overassessment to petitioner.
The Government contended the suit was barred.	The Government contended the suit was barred.

In the *Bonwit Teller* case this Court held that the action was grounded upon the determination evidenced by the certificate issued by the Commissioner, and that the cause of action arose upon delivery of the certificate to the plaintiff, saying (page 265):

> "The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S. Sec. 3226, as amended. 26 U. S. C. Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The over-

payment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance, because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. *The action* is not for the overpayment of the tax in 1919 but *is grounded upon the determination*[24] *evidenced by the certificate issued by the Commissioner May* 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570. United States v. Savings Bank, 104 U. S. 728. Bank of Greencastle's Case, 15 Ct. Cls. 25. There is no merit in the contention that the suit is barred." (283 U. S. 258, 265.) (Italics ours.)

It is respectfully submitted that the *Bonwit Teller* case and the present case are identical, and cannot be distinguished.

The Government's brief attempts to dispose of the *Bonwit Teller* case on the theory that this Court had before it only the question whether an action could be brought upon an account stated based upon a certificate of overassessment and no question with respect to the amount of the account was presented to or passed upon by the

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24 i. e., The determination of overpayment, not the determination to credit—cf. first sentence in opinion (283 U. S. at p. 259).

Court. In reply to this contention it should be noted that the question before this Court was whether the taxpayer was entitled to recover the *amount* of an overpayment for the year 1919. This *amount* was definitely reflected in the Court's decision and this Court concluded: "There is no merit in the contention that the suit is barred." The judgment of the Court of Claims was reversed and the taxpayer recovered the amount of the overpayment erroneously credited.

Any contention therefore, at this time that this Court did not pass upon the amount of the account or the amount due the taxpayer under the determination evidenced by the certificate of overassessment, is in effect an implication that the taxpayer in the *Bonwit Teller* case was not entitled to recover but through the failure of this Court to pass on a vital point recovery was erroneously allowed. It is submitted that such contention and implication is without merit and that this Court's decision in the *Bonwit Teller* case which permitted recovery by the taxpayer is sound whether based on the theory of account stated or the Commissioner's determination as evidenced by the certificate of overassessment delivered to the taxpayer.

Furthermore this Court's decision in the *Bonwit Teller* case simply gave effect to the mandatory provisions of the Revenue Acts, and in the present case the Commissioner's duty to refund the amount claimed in this proceeding is mandatory. Section 281(a), Revenue Act of 1924, in effect when the Commissioner determined and approved the overpayment in favor of this taxpayer provides in part:

> "Where there has been an overpayment of any income, war-profits, or excess profits tax imposed by * * * the Revenue Act of 1918, * * * the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The Commissioner determined that the taxpayer had overpaid its 1919 taxes in the sum of $14,928.07. The Commissioner was thereupon commanded by the Statute to credit this overpayment against taxes for other years *then due from the taxpayer* and to refund *any balance immediately* to the taxpayer. In the present case the Commissioner did not credit the overpayment against taxes *then due,* since the 1917 taxes were barred. His only alternative was therefore to refund the overpayment to the taxpayer, the overpayment having been scheduled and a claim for refund also having been filed within the statutory period.

This mandatory duty to refund the overpaid taxes does not fall within Section 3226 of the Revised Statutes. As stated by this Court in *Bonwit Teller & Company, supra,* "this case is not within the clause giving two years after disallowance, because here the claim was allowed" and "Upon delivery of the certificate to the plaintiff, there arose the cause of action on which this suit was brought."

Even prior to the decision in the *Bonwit Teller* case this Court held that the six year statute,

namely Section 1069 of the Revised Statutes, Judicial Code, Section 156, was applicable where suit is brought under a statutory provision directing a refund. *Sage* v. *United States,* 250 U. S. 33, 38-39 and *Fidelity & Deposit Co.* v. *United States,* 259 U. S. 296, 303. In each of these cases it was contended by the Government that the two year statute (then R. S. 3227) governed but this Court held that the six year statute of limitations appplied. While the *Sage and Fidelity & Deposit* cases involved the Act of July 27, 1912, C 256, Sect. 1, 37 Stat. 240, it is believed that Section 1069 of the Revised Statutes is equally applicable to the Revenue Acts involved in this proceeding.

Accordingly it is respectfully submitted that the suit in the present case is timely since brought within six years from the time the cause of action accrued, namely, the date the certificate of overassessment was delivered to petitioner.

The case of *Daube* v. *United States,* 289 U. S. 367, upon which the Government relies is materially different from the *Bonwit Teller* case and the present case. In the *Daube* case the Commissioner upon an audit found an overassessment for the year 1919 and mailed a notice to that effect to the plaintiff, "the notice by its terms being provisional and tentative." Later the Commissioner signed a schedule of overassessments and made out a check to the order of the plaintiff which he mailed to the Collector. The Collector, however, discovered that there was a mistake and instead of delivering the check returned it to the Commissioner. Thereupon the Commissioner cancelled the check and or-

dered the Collector to apply the overpayment for the year in question against taxes which were claimed for another year from the partnership of which plaintiff was a member.

But in the *Daube* case *there was no issuance or delivery to the taxpayer of a certificate of overassessment.* This Court distinguished it from the *Bonwit Teller* case as follows:

> *"A different situation was disclosed in the Bonwit Teller case, supra.* There the certificate of overassessment had been delivered to the taxpayer. 'Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought.' Bonwit Teller & Co. v. United States, *supra,* page 265. Cf. W. J. Friday & Co., Inc. v. United States, 61 F. (2d) 370.
>
> * * * * * *
>
> "A very different situation is laid before us here. No definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other competent authority. *The transaction never went beyond the stage of intra-departmental conference and parley."* (Italics ours.)

The present case differs from the *Daube* case and is like the *Bonwit Teller* case in that the certificate of overassessment was in fact issued and delivered to the taxpayer, and suit was brought within six years from the date of such delivery.

The material facts in this case are more nearly analogous to the facts in the case of *Moses et al.,* v. *United States,* 61 Fed. (2d) 791 (C. C. A. 2) cer-

tiorari denied 289 U. S. 743, where although recovery was denied taxpayer because suit was instituted in the District Court which lacked jurisdiction, the Court said (page 793):

> "In the case at bar, the plaintiffs proved facts which created a contractual obligation to pay over the allowed refund, and a breach of that obligation by retention of $52,000 for an unjustifiable reason, i. e., the illegally assessed additional tax for 1915."

The same contractual obligation exists in the present case and suit having been instituted in the Court of Claims which has jurisdiction, the taxpayer should recover.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY,
Boston, Massachusetts,
Petitioner,

v.

THE UNITED STATES

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

Counsel for petitioner believing themselves, under the rules, entitled to close the written as well as the oral argument, respectfully submit this supplemental memorandum in reply to respondent's "Supplemental Brief."

A.

The Government urges that "he who by his language or conduct leads another to do what he would not otherwise have done" should be estopped. and cites *Dickerson* v. *Colgrove,* 100 U. S. 578. In

the cited case the plaintiff made a definite written promise in unmistakable words, on which the defendant relied in buying property and improving it. But in the case at bar the claim for credit contained no promise and no representation that the taxpayer had any intention of waiving the statute of limitations. And there is no evidence that the Collector or the Commissioner did rely on the claim as extending the statutory period. All the record shows is that the Collector made a practice of postponing collections when claims for credit were filed.[1] But nothing in the record shows that it was his practice to postpone collection *beyond the statutory period,* in those cases. And no attempt was made to show that the taxpayer knew of the Collector's practice, whatever it was.[2]

If there had been any reliance on the claim for credit, the point would have been made below and the record would have shown the reliance. But only after this case got to the Supreme Court did Government counsel evolve the thought that they might be able to spell an estoppel out of something

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1 R. p. 6, finding No. 9.

2 This practice in the Collector's office was established by a Bureau ruling, IT-Mim. 2125 dated May 3, 1919. This ruling has never been published. It is addressed "To Collectors of Internal Revenue." Under Bureau practice it is customary to employ two types of addresses on rulings. The first is of the type mentioned above; the second is, "To Collectors of Internal Revenue and Others Concerned." We request this Court to take judicial notice of the fact that under Bureau practice not only are the rulings of the first type not published but also it is generally understood by Government employees that the contents of such communications are not to be divulged to taxpayers. Cf. dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Co.* v. *United States,* 2 Fed. Supp. at 145.

they think the Collector *might* have relied on if he had not been relying on something else.

Government counsel[1] cite Williston, *Contracts*, section 692, for the phrase "promissory estoppel", and the rule that the fundamental basis thereof is the justifiableness of the conduct of the party claiming the estoppel. Can the Government justify treating the claim for credit as a basis of estoppel without showing that the taxpayer knew or should have known that the claim might be treated as a waiver and that the Collector or the Commissioner did so treat it?

The Government stops its quotation from Williston a little too short. In the same section, the Professor says:

> "It should be observed, however, that where conduct rather than words is relied on as constituting a false representation, the conduct can hardly be considered such if the party against whom the estoppel is claimed is ignorant of the facts which make his conduct deceptive. His conduct is like the use of ambiguous language in ignorance of the facts which make it ambiguous."

The Government says,[2] "We submit that no policy such as is involved in preventing avoidance of the statute of frauds, bars the assertion of estoppel here." The reason Congress provided a specific method for extending the statutory period of limitation is identical with the reason on which

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1 Supplemental Brief, p. 2.
2 Supplemental Brief, p. 4.

statutes of frauds are based—to prevent claims by taxpayers or the Government that the time for making refunds or the time for making assessments had been extended by oral or implied promise.

While this Court has had occasion, so far as we know, to pass on only one case of estoppel to plead the statute of limitations,[1] there are many state court decisions in point, some of which are cited in the margin, should the Court care to examine them.[2]

Government counsel wander again into the realms of imagination when they say[3] that "The petitioner's entire conduct in the transaction (including its acquiescence in the Commissioner's action) shows, we submit, that it intended this claim to be a basis for a final settlement of its 1917 taxes, one element of which was the acknowledgment that the taxes claimed for that year were due." The claim for credit contained no such ackowledgment —it was filed because the taxpayer received a notice and demand for an asserted deficiency and had no right to enjoin collecton.[3] Instead of paying cash

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1 *Andreae* v. *Redfield*, 98 U. S. 225.

2 *Klass* v. *City of Detroit*, 129 Mich. 35, 88 N. W. 204; *Miller* v. *Ahneman*, 183 Minn. 12. 235 N. W. 622; *Neal* v. *Pickett*, (Tex. Civ. Appeals) 280 S. W. 748; *Monroe* v. *Hurington*, 110 Mo. App. 509, 85 S. W. 1002.

3 Supplemental Brief, p. 4.

4 A cogent answer to this argument by the Government is given in Cooley's Blackstone, Vol. II, p. 306, where in the footnote discussing what sort of an acknowledgment is required to extend the statute of limitations the following case is cited. A says to B that the latter owes him money. B replies, "You owe me more money; I have a set-off against it." Such a statement is not an acknowledgment extending the statute of limitations. 2 B. and A., 759.

(which the Collector might have refused to accept)[1] the taxpayer authorized the Collector to collect the 1917 deficiency out of any over-payment the taxpayer might have made for 1918-1921. This did not constitute a concession of the accuracy of the 1917 computation any more than payment in cash would have constituted such concession—and the taxpayer had to do one or the other under duress of threatened distraint.

And there is nothing in the record to indicate that the taxpayer intended a final settlement of its 1917 tax.[2]

Since the claim for credit did not admit the correctness of the Collector's demand, it cannot constitute an account stated against the taxpayer. It is quite different from the certificate of overassessment by which the Commissioner did admit that the 1918 tax had been overpaid.

B.

The Government says[3] that there is no evidence that the Commissioner "refused" to sign the waiver except "the mere failure to sign promptly."

We submit that when the Commissioner refrained for over seven years from signing the waiver, his action was legally equivalent to refusal.

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1 *Cf. United States* v. *Pacific Midway Oil Co.*, reported in Commerce Clearing House, Federal Tax Service for 1932, at p. 8280.

2 Even if it had such an intent, it would have been ineffective. *Botany Worsted Mills* v. *United States*, 278 U. S. 282.

3 Supplemental Brief, pp. 5-6.

C.

The extremes to which the Government is put, in its effort to find a justification for the judgment below, are exemplified in the last paragraph of its Supplemental Brief. We did not refer to section 281(b) of the Revenue Act of 1924—because it is rendered inapplicable by section 281(f).

Section 281(f) provides:

> "This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable * * *."

The claim for credit had been duly filed under section 252(a) of the Revenue Act of 1921[1] which allowed five years for filing claims for credit, and the claim for credit of August 9, 1923 had been filed within five years after due date of the 1918 tax return.

Respectfully submitted,

FREDERICK S. WINSTON,
Attorney for Petitioner.

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1 As amended by Act of March 4, 1923, c. 276, 42 Stat. 1504.

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In the Supreme Court of the United States

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 4–13) is reported in 2 F.Supp. 773.

JURISDICTION

The judgment of the court below was entered March 13, 1933 (R. 13). A motion to modify the opinion was overruled May 8, 1933 (R. 13). Petition for writ of certiorari was filed June 7, 1933 (R. 14). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

On February 19, 1923, petitioner filed a waiver of the period of limitation upon assessment and collection for the year 1917, extending said period to

March 1, 1925. On June 26, 1923, the Commissioner made an additional assessment against petitioner, admittedly valid under a prior waiver, and the assessment list attached to the Commissioner's certification contained a notation that a waiver was on file. The waiver of February 19, 1923, was signed by the Commissioner on April 7, 1930. The question presented is whether that waiver permitted the Commissioner to collect the additional assessment by means of a credit on June 28, 1924.

STATUTES INVOLVED

The applicable provisions of the revenue laws appear in the Appendix (*infra*, p. 10).

STATEMENT

The findings of fact of the Court of Claims are as follows:

On September 29, 1917, petitioner filed its income and profits tax returns for the fiscal year ending July 31, 1917 (R. 4). Certain additional assessments were made against petitioner for the year 1917 and were paid (R. 4). The petitioner filed its income and profits tax return for the fiscal year ending July 31, 1918, on October 28, 1919, and an additional return for the same year on June 19, 1919, and the tax shown due on such returns was duly assessed and paid (R. 4–5).

On February 19, 1921, petitioner filed a waiver of assessment for the year 1917, which was approved by the Commissioner on February 6, 1923 (R. 5). This waiver expired April 1, 1924 (R. 5).

On February 19, 1923, petitioner filed a waiver of assessment and collection for the years 1917 and 1918, extending the period to March 1, 1925 (R. 5). The Commissioner's signature to this waiver was subscribed by an authorized officer on April 7, 1930 (R. 6). On April 7, 1930, the Commissioner of Internal Revenue was Robert H. Lucas, and his term as Commissioner extended from June 1, 1929, to August 15, 1930 (R. 6).

In June 1923 the Commissioner made an additional assessment against the petitioner for the fiscal year ending July 31, 1917, and signed and certified this assessment on June 26, 1923 (R. 6). On the attached assessment list, a notation opposite the item pertaining to petitioner, contained the word "Waiver" (R. 6). No proof was offered as to what particular document the word "waiver" had reference (R. 6). The additional assessment for 1917 was reduced by a credit of an overassessment for the year 1916 and, as reduced, amounted to $20,757.14. Payment of it was demanded by the Collector on August 3, 1923 (R. 6).

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded (R. 6). At that time it was

the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim (R. 6).

On March 1, 1924, the Commissioner approved a schedule of overassessments which showed an overassessment in favor of petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07 and sent this schedule to the Collector for his action in accordance with directions appearing thereon (R. 6–7). After complying with the Commissioner's instructions, the Collector signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits certifying the application of $14,928.07 as a credit (R. 7). The Commissioner signed the schedule of refunds and credits on June 28, 1924, and transmitted to petitioner a certificate of overassessment of the above amount for the fiscal year ending July 31, 1918 (R. 7). The overassessment for the fiscal year ending July 31, 1918, applied as a credit, reduced the liability of petitioner for the fiscal year ending July 31, 1917, to $5,829.07 (R. 7). This last amount was paid, with accrued interest, on September 15, 1924 (R. 7).

On May 16, 1930, petitioner filed claims for refund for the fiscal years ending July 31, 1917 and 1918, each in the amount of $14,928.07, on the ground that said amounts had been illegally assessed and illegally collected after the statutory period of limitation, and there were no valid waivers on file with the Commissioner (R. 7).

This suit was begun by a petition filed in the court below May 20, 1930 (R. 1). The court dismissed the petition (R. 13).

ARGUMENT

The petitioner contends that the second waiver filed by it was ineffective to extend the period of limitation upon the collection of its 1917 taxes, because the Commissioner did not sign the waiver within the period of limitation, and did not sign it until after the passage of Section 1106 (a) of the Revenue Act of 1926, and Section 506 of the Revenue Act of 1928, *infra,* p. 11.

The present case does not involve the question whether a waiver is void if not signed by or on behalf of the Commissioner of Internal Revenue, because it is admitted that the Commissioner signed the waiver in this case. That question is now awaiting the decision of this Court on writ of certiorari to the Circuit Court of Appeals for the Third Circuit. *Burnet* v. *U.S. Refractories Corporation,* No. 20, October Term, 1933.

The petitioner's contention, therefore, presents the view that the validity of a waiver is to be judged as of the date when it is signed by the Commisioner, rather than the date when it is filed by the taxpayer. Section 250 (d) of the Revenue Act of 1921, *infra,* p. 10, in effect when the petitioner filed the waiver, placed no restriction upon the time within which the Commissioner's consent could be given. Petitioner supports its

view by reference to language appearing in a number of decisions (Br. in Support, p. 26). None of those cases involved the question presented here, and whatever language lends support to petitioner's contention seems to have been based upon the theory that a waiver is a contract, a supposition not now approved by this Court. *Stange* v. *United States*, 282 U.S. 270; *Aiken* v. *Burnet*, 282 U.S. 277, 281; *Burnet* v. *Railway Equipment Co.*, 282 U.S. 295, 298–299. As this Court said in *Stange* v. *United States*, *supra*, p. 276:

> As pointed out in *Florsheim Brothers, etc.* v. *United States*, 280 U.S. 453, 466, a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. * * *

From this we think it follows that the date of the Commissioner's signature is not of controlling importance with respect to the validity of the waiver, even though this Court may decide that the signature is required at some time in order to render effective the action taken pursuant to the waiver, *Mosier* v. *Goodcell*, 49 F. (2d) 391, 393, (S.D.Cal.); *National Piano Mfg. Co.* v. *Commissioner of Internal Revenue*, 11 B.T.A. 46, affirmed, 50 F. (2d) 310 (App. D.C.); cf. *Pantages Theater Co.* v. *Lucas*, 42 F. (2d) 810 (C.C.A. 9th), certiorari denied, 282 U.S. 890.

Furthermore, we think that in the circumstances disclosed in this case the signature of the Commissioner upon the waiver itself was not essential to its validity. The statute requires only that the Commissioner consent in writing, and it is not necessary that the consent of both the taxpayer and the Commissioner be evidenced on a single document. *Sabin* v. *United States,* 70 C.Cls. 574; *Eclipse Lawn Mower Co.* v. *United States,* 1 F. Supp. 768 (C.Cls.). In the case at bar the Commissioner signed and certified the additional assessment against the petitioner, and on the assessment list attached thereto, opposite the item pertaining to petitioner, was the notation "Waiver." At the time of this signature and notation, the disputed waiver was on file, and we think the court correctly held that the notation satisfied the requirement of the statute. *Eclipse Lawn Mower Co.* v. *United States, supra;* see G.C.M. 1682, VI–1 C.B. 110.

In any event, we contend that a taxpayer who filed a waiver upon which it seems fair to say that the Commissioner relied in delaying collection, and who accepted the benefits accruing from the delayed collection is not in a position to attack the validity of the waiver. *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703, 704 (C.C.A. 3d); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner of Internal Revenue,* 43 F. (2d) 782, 784–785 (C.C.A. 4th).

The case at bar does not raise the question presented in *Burnet* v. *Northern Coal Co.* and *Burnet*

v. *C. H. Sprague & Son Co.*, pending on writs of certiorari, Nos. 18–19, October Term, 1933; *Burnet* v. *Oswego & Syracuse Railroad Co.*, pending on writ of certiorari, No. 21, October Term, 1933; and *Burnet* v. *U.S. Refractories Corporation, supra.* Those cases present the question whether waivers executed after the expiration of the statute of limitations and after the enactment of Section 1106 of the Revenue Act of 1926, but prior to the effective date of the Revenue Act of 1928, are valid. In our view, the waiver involved in the present case was executed at the time it was filed by the petitioner, namely, February 19, 1923, and effectively extended the period for the collection of petitioner's 1917 taxes.

Even if petitioner's contentions concerning the validity of the waiver be assumed correct, we think there is no basis for recovery in this case. It is clear that the petitioner's action is based upon an account stated (R. 10). The account stated, when it exists at all in this type of case, is contained in the certificate of overassessment delivered to the taxpayer (*Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 265; *Wm. J. Friday & Co., Inc.* v. *United States*, 61 F. (2d) 370 (C.C.A. 3d), and the liability on the account is predicated upon a balance arrived at in favor of the taxpayer. *Daube* v. *United States*, No. 634, October Term, 1932, decided May 8, 1933. But in the case at bar the findings show that the certificate of overassessment indicated a deficiency, rather than an amount to be

refunded (R. 7). There was no balance struck in favor of petitioner and, therefore, no amount which the Commissioner impliedly promised to pay. *Earle* v. *United States,* No. L-291, C.Cls., *Leisenring* v. *United States,* No. L-221, C.Cls., both decided June 5, 1933.

Petitioner specifies as error and assigns as a reason for granting the writ, a statement in the opinion of the court below, which petitioner believes is a reflection upon the propriety of petitioner's conduct or that of its attorneys. We do not think that this matter can appropriately be considered as a reason for the allowance of the writ, and we deem it proper to refrain from discussion thereof.

CONCLUSION

There appears to be no conflict of decisions. We submit that the decision of the court below is correct, and that the petition should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

FRANK J. WIDEMAN,
Assistant Attorney General.

J. R. FILLMAN,
Attorney.

JULY 1933.

APPENDIX.

Revenue Act of 1921, c. 136, Sec. 250 (d), 42 Stat. 227, 265, provides in part

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1926, c. 27, Sec. 1106 (a), 44 Stat. 9, 113, provides

The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but

shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U.S.C.App., Title 26, Sec. 1249.)

Revenue Act of 1928, c. 842, 45 Stat. 791, 870, 875, provides in part

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

"(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

* * * * *

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

" (f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective ac-

cording to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

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OPINION BELOW

The opinion of the court below (R. 4–13) is reported in 2 F.Supp. 773.

JURISDICTION

The judgment of the court below was entered March 13, 1933. (R. 13.) A motion to modify the opinion was overruled May 8, 1933. (R. 13.) The petition for a writ of certiorari was filed June 7, 1933 (R. 14) and was granted October 9, 1933. (R. 15.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxpayer may recover the amount of taxes credited pursuant to a claim for credit which it filed, on the ground that the formal entry of the credit was made after the expiration of the statutory period for collecting the tax.

2. If the taxpayer may object to the validity of the credit, whether a waiver filed on February 19, 1923, but signed by the Commissioner on April 7, 1930, was valid to permit the Commissioner to make the credit on June 28, 1924.

3. Whether, in the circumstances of this case, the petitioner may recover the amount of an alleged illegal credit as upon an account stated.

STATUTES INVOLVED

The statutes involved are set out in Appendix A, *infra,* pp. 23–25.

STATEMENT

The findings of fact of the Court of Claims (R. 4–7) may be summarized as follows:

On September 29, 1917, the petitioner filed its income and profits tax returns for the fiscal year ending July 31, 1917. (R. 4.) Certain additional assessments were made against the petitioner for the year 1917 and were paid. (R. 4.) The petitioner filed its income and profits tax return for the fiscal year ending July 31, 1918, on October 29, 1918, and an additional return for the same year on June 19, 1919, and the tax shown due on such returns was duly assessed and paid. (R. 4–5.)

On February 19, 1921, the petitioner filed a waiver of assessment for the year 1917, which was approved by the Commissioner on February 6, 1923. (R. 5.) This waiver expired April 1, 1924. (R. 5.)

On February 19, 1923, the petitioner filed a waiver of assessment and collection for the years 1917 and 1918, extending the period to March 1, 1925. (R. 5.) The Commissioner's signature to this waiver was subscribed by an authorized officer on April 7, 1930. (R. 6.) On April 7, 1930, the Commissioner of Internal Revenue was Robert H. Lucas, and his term as Commissioner extended from June 1, 1929, to August 15, 1930. (R. 6.)

In June, 1923, the Commissioner made an additional assessment against the petitioner for the fiscal year ending July 31, 1917, and signed and certified this assessment on June 26, 1923. (R. 6.) On the attached assessment list, a notation opposite the item pertaining to the petitioner contained the word "Waiver." (R. 6.) No proof was offered as to what particular document the word "waiver" referred. (R. 6.) The additional assessment for 1917 was reduced by a credit of an overassessment for the year 1916 and, as reduced, amounted to $20,757.14. Payment of it was demanded by the Collector on August 3, 1923. (R. 6.)

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that the unpaid balance for the

fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded. (R. 6.) At that time it was the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim. (R. 6.)

On March 1, 1924, the Commissioner approved a schedule of overassessments which showed an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07 and sent this schedule to the Collector for his action in accordance with directions appearing thereon. (R. 6–7.) After complying with the Commissioner's instructions, the Collector signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits certifying the application of $14,928.07 as a credit. (R. 7.) The Commissioner signed the schedule of refunds and credits on June 28, 1924, and transmitted to the petitioner a certificate of overassessment of the above amount for the fiscal year ending July 31, 1918. (R. 7.) The overassessment for the fiscal year ending July 31, 1918, applied as a credit, reduced the liability of the petitioner for the fiscal year ending July 31, 1917, to $5,829.07. (R. 7.) This last amount was paid, with accrued interest, on September 15, 1924. (R. 7.)

On May 16, 1930, the petitioner filed claims for refund for the fiscal years ending July 31, 1917, and

1918, each in the amount of $14,928.07, on the ground that these amounts had been illegally assessed and illegally collected after the statutory period of limitation, and at a time when there were no valid waivers on file with the Commissioner. (R. 7.)

This suit was begun by a petition filed in the court below on May 20, 1930. (R. 1.) The court dismissed the petition. (R. 13.)

SUMMARY OF ARGUMENT

I

The taxpayer may not object to the credit which was made pursuant to its claim for credit; the validity of the waivers is immaterial. The legal effect of the filing of a claim for credit, we contend, is that the credit which the taxpayer asks may be made at any time without regard to the statutory period of limitation against collection by distraint or proceedings in court. The collector's notice and demand in this case on August 3, 1923, would plainly have resulted in a timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed its claim for credit. The petitioner's claim for credit required examination of its returns for four separate years, a matter which would obviously require a considerable amount of time. The taxpayer plainly contemplated that the Commissioner would consider these returns thoroughly and not precipitately. The petitioner secured the benefit which it sought of not being forced

to pay in cash, under distraint or other proceedings to collect the tax, and it should not now be heard to claim that the Commissioner ought not to have relied on its action and should have declined to accord it the benefit.

The position of the taxpayer here is not materially different, we submit, from that of the taxpayers in several other cases who have been denied recovery where, through the filing of a claim for credit or otherwise, they induced the Commissioner to delay the collection of the tax until after the statutory period. *Naumkeag Steam Cotton Co.* v. *United States,* 2 F.Supp. 126 (C.Cls.); *Daube* v. *United States,* 75 C.Cls. 633, affirmed on another point, 289 U.S. 367; *Ralston Purina Co.* v. *United States,* 75 C.Cls. 525, certiorari denied, 289 U.S. 732; *Backus* v. *United States,* 75 C.Cls. 69, certiorari denied, 288 U.S. 610.

II

If the petitioner may object to the validity of the credit made pursuant to its claim for credit, then the question of the validity of the waiver filed February 19, 1923, arises. The petitioner having secured the benefit of the Commissioner's reliance upon the validity of this waiver is estopped, we submit, from attacking it.

The objection made is that the Commissioner did not sign the waiver until April 7, 1930, and that this renders it invalid. But the Commissioner's signing and certification of the additional assessment

for 1918 contained a notation that there was a waiver, and we contend that this satisfied the requirement that the Commissioner consent in writing. The signature of the Commissioner and the taxpayer need not appear on the same document. We contend, finally, that the Commissioner's signature is not essential to the validity of a waiver and that, even if it is, there is no requirement that the Commissioner must sign within any specified time. The waiver is not rendered void because the signature was tardy.

III.

The petitioner failed to pursue its remedies under the revenue laws and brings this action upon an account stated. But the account shows no balance struck in favor of the petitioner and thus fails to meet the test of an account stated. The ruling in *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, is not to be extended to such a case.

ARGUMENT

I

THE TAXPAYER MAY NOT OBJECT TO THE CREDIT MADE PURSUANT TO THE CLAIM FOR CREDIT WHICH IT FILED, AND THE VALIDITY OF THE WAIVERS IS IMMATERIAL

The assessment of additional taxes for the fiscal year ending July 31, 1917, was validly made on June 26, 1923, while the petitioner's first waiver was in full effect, and after the petitioner had filed

its second waiver with the Commissioner. On August 3, 1923, the collector demanded payment of the sum of $20,757.14 due under this assessment. (R. 6.) Six days later, on August 9, 1923, and obviously in order to prevent the collector from enforcing his demand for payment, the taxpayer filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920 and 1921 in a total amount of $35,727.10, asking that the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded. (R. 6.) At that time it was the practice of the collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim. (R. 6.) On March 1, 1924, while the first waiver was still in full effect, the Commissioner approved a schedule of overassessment which showed an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07. (R. 6–7.) The collector certified the application of this sum as a credit and the Commissioner signed the schedule of refunds and credits on June 28, 1924. (R. 7.) It is the amount so credited which the petitioner seeks to recover here in a suit which was not brought until nearly six years after the date of the credit.

We submit that the legal effect of the filing of a claim for credit is that the credit which the tax-

payer asks may be made at any time without regard to the statutory period of limitation against collection by distraint or proceedings in court. The effect of the claim for credit, we submit, was the equivalent of a statement by the taxpayer to the Commissioner that "We accept your determination that $20,757.14 is still due on account of our taxes for the fiscal year ending July 31, 1917. It is unnecessary for you to collect this sum, however, as we have already paid it in the form of overpayments for other years. You are authorized and requested to make the necessary bookkeeping entries to show that the amounts assessed for 1917 have already been paid and you may reduce the refund due us for the other years accordingly."

The collector's notice and demand on August 3, 1923, would plainly have resulted in a timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed its claim for credit. Under the practice of the collector's office, this claim operated as a stay of collection of the 1917 taxes until the Commissioner had had an opportunity to consider the claim. The petitioner gave plain indication of its complete understanding of the whole course of events by subsequently paying without protest $5,829.07 of the tax not covered by the credit which the Commissioner allowed (R. 7), and by accepting the entire transaction without question until nearly six years after it had occurred.

That the taxpayer intended when it filed its claim for credit that the formal bookkeeping entry could be made after the statutory period for collection by distraint or proceeding in court had expired is emphasized by the fact that at the time the claim for credit was filed there was no provision of law prescribing the time within which a credit must be made. Section 250 (d) of the Revenue Act of 1921 (*Infra*, p. 23) provided that "no suit or proceeding for the collection" of taxes should be begun after five years after the return was filed. But this provision did not refer specifically to credits, and, we submit, was not broad enough in its terms and was not intended to prescribe a limitation on the time within which a credit might be made. There was, therefore, no statutory provision in effect when the claim for credit was filed limiting the time within which the credit had to be made, and the taxpayer must have contemplated, therefore, that the credit asked for might be made by the Commissioner without regard to the limitation period prescribed for the beginning of suits and other proceedings.

The petitioner's claim for credit required the examination of its returns for four separate years, a matter which would obviously require a considerable amount of time. The taxpayer plainly contemplated, we submit, that the Commissioner would consider these returns thoroughly and not precipitately. There was nothing in the petitioner's conduct nor in the claim for credit itself to show that

the petitioner intended to settle its tax accounts by means of the requested credit only if the Commissioner finally determined the amount of the overpayments to be credited within the rapidly expiring period for collection.[1] The petitioner secured the benefit which it sought of not being forced to pay in cash, under distraint or other proceedings to collect the tax, and it should not now be heard to claim that the Commissioner ought not to have relied on its action and should have declined to accord it the benefit.

The position of the taxpayer here is not materially different, we submit, from that of the taxpayers in several other cases who have been denied recovery where, through the filing of a claim for credit or otherwise, they induced the Commissioner to delay the collection of the tax until after the statutory period. *Naumkeag Steam Cotton Co.* v. *United States,* 2 F.Supp. 126 (C.Cls.); *Daube* v. *United States,* 75 C.Cls. 633, affirmed on another

[1] The petitioner's original unlimited waiver was made to expire on April 1, 1924, by the Commissioner's Mimeograph 3085 (II-1 Cumulative Bulletin 174), which was promulgated April 11, 1923, before the taxpayer's claim for credit was filed. If the petitioner's argument that the Commissioner intentionally refrained from signing the second waiver because he did not desire it to go into effect is valid, then the Commissioner understood when the claim for credit was filed that the time for collection expired April 1, 1924, less than ten months after the claim for credit was filed. If, on the other hand, the Commissioner accepted the second waiver and relied on it, as we contend below, then the credit was made before the expiration of the limitations period.

point, 289 U.S. 367; *Ralston Purina Co.* v. *United States,* 75 C.Cls. 525, certiorari denied, 289 U.S. 732; *Backus* v. *United States,* 75 C.Cls. 69, certiorari denied, 288 U.S. 610. Cf. *Dickerson* v. *Colgrove,* 100 U.S. 578, 580–581.

The petitioner may contend that the credit here was invalid even though made pursuant to its claim for credit, because after the transaction involved, Sections 607 and 609 of the Revenue Act of 1928 (*infra,* pp. 24–25) were enacted. So far as pertinent, they provide in substance that a credit against a liability at a time when collection is barred shall be void. But these sections, we submit, refer only to credits made by the Commissioner on his own motion and were not intended to invalidate credits already made pursuant to the express request of the taxpayer. There is nothing in these provisions indicating that Congress intended to make the rules of equitable estoppel inapplicable to credits and, of course, it is quite as unconscionable for the petitioner to seek to repudiate the consequences of its conduct on the theory that the credit made was void, as it would be if the attack were based on the ground that the credit was merely untimely. There seems to be no more reason for applying these statutory provisions to invalidate the credit here than in the cases cited above.

Whether the second waiver in this case was valid or not, therefore, we contend that the credit made by the Commissioner was proper, since it was

made pursuant to an express claim for credit filed by the taxpayer. If this position is not correct, then we contend below that the second waiver filed by the taxpayer was valid and that the credit was accordingly made before the expiration of the statutory period.

II

THE SECOND WAIVER FILED BY THE TAXPAYER WAS VALID ALTHOUGH THE COMMISSIONER DID NOT SIGN IT UNTIL APRIL 7, 1930

The disputed waiver in this case was filed by the petitioner on February 19, 1923, before the expiration of a prior waiver admittedly valid. The new waiver expired by its own terms on March 1, 1925, and was not signed by the Commissioner until April 7, 1930. Section 506 (b) of the Revenue Act of 1928 (*infra*, pp. 23–24) provides that a waiver executed after the period of limitation is valid if entered into before January 1, 1929. The petitioner contends that this provision renders the waiver invalid and that the petitioner is entitled to recover the amount credited against its 1917 taxes,[2] since the credit was made after the period of limitation, as extended by the first waiver, had expired.

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[2] Petitioner also relies upon Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U.S.C.App., Title 26, Sec. 1249 (a)), repealed as of the date of its passage by Section 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875. If the waiver in dispute is to be judged as of the date when it was signed by the Commissioner, concededly it is invalid under Section 506 (b) of the 1928 Act, and the application of Section 1106 (a) of the 1926 Act need not be considered.

We submit that the petitioner is estopped to assert the invalidity of the waiver in order to recover the amount of the credit. The waiver was in proper form except for the tardiness of the Commissioner's signature. The petitioner subsequently on August 9, 1923, filed a claim for refund and credit involving the years 1917–1921 (R. 6), thus requesting an examination of its returns for those years. When more time was required for this work than the first waiver allowed, it seems reasonable to conclude that the Commissioner relied upon the second waiver. The petitioner's claim for credit was allowed, with the result that the petitioner was asked to pay only a small portion of the additional tax for 1917. Having thus benefited by the Commissioner's compliance with its requests, the petitioner appeared to be satisfied for nearly six years, and then attacked the waiver upon which the Commissioner relied in extending to the petitioner the benefit of considering and allowing its claim for credit. In these circumstances the petitioner should not be heard to repudiate the document by which it expressly waived the statute of limitations upon a tax admittedly due. See *Thiel Service Co.* v. *Commissioner,* 50 F. (2d) 173 (C.C.A. 7th); *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703 (C.C.A. 3d); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner,* 43 F. (2d) 782, 784 (C.C.A. 4th); see also *Magee* v. *United States,* 282 U.S. 432.

The petitioner argues that there could have been no acceptance of or reliance upon the second

waiver because at the time it was filed, February 19, 1923, the first waiver had not yet been limited in duration since the Commissioner's Mimeograph 3085 (II-1 Cumulative Bulletin 174), setting April 1, 1924, as the expiration date, was not promulgated until April 11, 1923. There are adequate answers to the argument. In the first place the unlimited waiver probably did not extend the period of limitation "forever", as the petitioner states, but only for a reasonable time. *Pictorial Printing Co.* v. *Commissioner,* 38 F. (2d) 563 (C.C.A. 7th); *Frost* v. *Commissioner,* 23 B.T.A. 411, 416; cf. *Big Four Oil & Gas Co.* v. *Heiner,* 57 F. (2d) 29 (C.C.A. 3d); *Greylock Mills* v. *White,* 63 F. (2d) 866, 868 (C.C.A. 1st). If notice of termination is required (see *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655, 658 (C.C.A. 2d), certiorari denied, 280 U.S. 566), we think that the filing of the second waiver could constitute such notice. Cf. *Ethel D. Co.* v. *Commissioner,* 27 B.T.A. 25. Furthermore, the petitioner's argument seems to be based upon the assumption that the Commissioner must have either accepted or refused to accept the waiver between the date it was filed and the date of the issuance of Mimeograph 3085, but no reason is advanced why that assumption is proper. In any event the Commissioner's reliance upon the waiver occurred after the issuance of Mimeograph 3085 when the Commissioner delayed collection and considered the petitioner's claim for refund and credit.

The suggestion that the Commissioner could not have relied upon the waiver because it was his belief that there was no period of limitation upon collection was answered by this Court in *Stange* v. *United States,* 282 U.S. 270, 277:

> That the parties at the time may have believed that collection was possible independent of any waiver, does not make less effective the instrument given for the purpose of tolling the limitation on the ultimate determination and collection of the tax. It must be assumed that an effective and not a futile act was intended.

We further contend that the Commissioner's signature was not essential to the validity of the waiver, and that even if the Commissioner had never signed the waiver, it would still be valid. The Government's argument with respect to the necessity of the Commissioner's signature is fully treated in the Government's brief in *Helvering* v. *U.S. Refractories Corp.,* No. 20, present term. For the reasons stated therein we submit that the Commissioner's signature to the waiver was unnecessary, and, that being so, his failure to sign within any specified time could not affect the validity of the waiver. The decision of the Circuit Court of Appeals for the Third Circuit in that case (64 F. (2d) 69) was affirmed by this Court on October 23, 1933, but by any equally divided court.

Even if this Court should hold that the signature of the Commissioner is essential, we think that in

the circumstances disclosed in this case the requirement of the statute was satisfied without the signature of the Commissioner upon the waiver itself. When the Commissioner on June 26, 1923, signed and certified the additional assessment against the petitioner for 1917, there was on the attached assessment list a notation, opposite the item pertaining to the petitioner, containing the word, "waiver." (R. 6.) The statute requires only that the Commissioner consent in writing (Revenue Act of 1921, Section 250 (d); *infra* p. 23), and it has been held that it is not necessary for the consent of both the taxpayer and the Commissioner to be evidenced upon a single document. *Sabin* v. *United States,* 70 C.Cls. 574; *Eclipse Lawn Mower Co.* v. *United States,* 1 F.Supp. 768 (C.Cls.). No proof was offered as to what waiver the notation on the attached list referred, but we think the court below was correct when it concluded that the word applied to the second waiver, and not to the first. The second waiver was on file at the time the notation was made. Moreover, the first waiver covered only the year 1917, while the second waiver covered both 1917 and 1918, which were the two years involved in the credit.

Assuming that the signature of the Commissioner is essential and that the requirement was not met by the signing and certification of the assessment, discussed above, we do not think it follows that the validity of the waiver must be determined

as of the date when it was signed by the Commissioner rather than the date when it was filed by the taxpayer. There is nothing in the statute or in the nature of a waiver that leads to this conclusion. Section 250 (d) of the Revenue Act of 1921 (*infra*, p. 23), in effect when the petitioner filed the waiver, prescribed no time within which the Commissioner's consent had to be evidenced by his signature; it simply allowed a later collection when both the Commissioner and the taxpayer consented in writing.[3]

We do not understand the petitioner to suggest that the signature of Commissioner Lucas was unauthorized or invalid or rendered the waiver void simply because the waiver was filed during the incumbency of Commissioner Lucas' predecessor in office. The assertion that Commissioner Blair never intended to accept the waiver, even if material, cannot be justified as there is no finding that such was the case.

It has been repeatedly stated by this Court that a waiver is not a contract, but only a voluntary unilateral waiver of a defense by a taxpayer, and that the provision requiring the Commissioner's

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[3] No change in this respect was made in the later acts. Revenue Act of 1924, c. 234, 43 Stat. 253, 300, Sec. 278 (c) (U.S.C., Title 26, Sec. 1060); Revenue Act of 1926, c. 27, 44 Stat. 9, 59, Sec. 278 (c) (U.S.C.App., Title 26, Sec. 1060); Revenue Act of 1928, c. 852, 45 Stat. 791, 870, Sec. 506 (a).

signature was inserted in the statute solely for administrative purposes. *Stange* v. *United States, supra,* p. 276; *Aiken* v. *Burnet,* 282 U.S. 277, 281; *Burnet* v. *Railway Equipment Co.,* 282 U.S. 295, 298–299; see *Florsheim Bros. Co.* v. *United States,* 280 U.S. 453, 466–477. The signature of the Commissioner is a ministerial act not required for the protection of any substantial rights of the taxpayer, and an irregularity in signing does not render the waiver void. See *Stern Bros. & Co.* v. *Burnet,* 51 F. (2d) 1042 (C.C.A. 8th); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner,* 43 F. (2d) 782 (C.C.A. 4th); *Board* v. *Commissioner,* 51 F. (2d) 73 (C.C.A. 6th), certiorari denied, 284 U.S. 658; *L. J. Christopher Co.* v. *Commissioner,* 55 F. (2d) 530 (App. D.C.); *Onandaga* v. *Commissioner,* 50 F. (2d) 397 (C.C.A. 2d), certiorari denied, 284 U.S. 671; *United Thacker Coal Co.* v. *Commissioner,* 46 F. (2d) 231 (C.C.A. 1st); *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655 (C.C.A. 2d), certiorari denied, 280 U.S. 566; *Fleitmann* v. *Commissioner,* 65 F. (2d) 176 (App. D.C.), certiorari denied Oct. 9, 1933, No. 234, present term; *Sabin* v. *United States,* 70 C.Cls. 574, *supra; Eclipse Lawn Mower Co.* v. *United States,* 1 F.Supp. 768 (C. Cls.), *supra.* The failure of the Commissioner to sign within the period of limitation as extended by the waiver is such an irregularity and does not vitiate the waiver. *Mosier* v. *Goodcell,* 49 F. (2d) 391 (S.D. Cal.); see

National Piano Mfg. Co. v. *Commissioner,* 11 B.T.A. 46, affirmed, 50 F (2d) 310 (App. D.C.).

III

THE PETITIONER'S SUIT IS ONE UPON AN ACCOUNT STATED, AND THE ACCOUNT SHOWS NO BALANCE STRUCK IN FAVOR OF THE PETITIONER

Assuming that the petitioner's argument with respect to the validity and effectiveness of the disputed waiver is sound, still we contend that no recovery may be had in this suit. The petitioner acknowledges that this suit is brought upon an account stated, but we think it has failed to establish an account upon which recovery may be based. In this type of case, the account stated, if any exists at all, is found in the certificate of overassessment delivered to the taxpayer. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, 265; *Daube* v. *United States,* 289 U.S. 367, 370; *Wm. J. Friday & Co., Inc.,* v. *United States,* 61 F. (2d) 370 (C.C.A. 3d). Liability upon the account is predicated on a balance struck as the result of computation and agreement. *Daube* v. *United States, supra,* p. 370; *Toland* v. *Sprague,* 12 Pet. 300, 335; *Volkening* v. *DeGraaf,* 81 N.Y. 268, 270; *Chace* v. *Trafford,* 116 Mass. 529, 533. A certificate of overassessment was delivered to the petitioner, which noted the overassessment for 1918 sought to be recovered in this suit (R. 7), but because the overassessment had been credited against petitioner's 1917 tax liability there

was no indication in the certificate of an agreement to pay the amount of the overassessment.[4]

There was no balance struck in favor of the petitioner in this certificate and therefore no amount which the Commissioner impliedly promised to pay the petitioner as in an account stated. As to this point the case falls squarely within the rule of two recent decisions of the Court of Claims. *Leisenring* v. *United States,* 3 F.Supp. 853 (C.Cls.); *Earle* v. *United States,* 3 F.Supp. 849 (C.Cls.).

As pointed out by this Court in *Daube* v. *United States, supra,* pp. 372–373, extension of the period of limitation in the revenue laws is opposed to the public interest requiring stability and certainty in the Government revenues, and the ruling in *Bonwit Teller & Co.* v. *United States, supra,* is "not to be extended through an enlargement of the concept of an account stated by latitudinarian construction." We submit that it is only by such enlargement of the principles of account stated that the Commissioner's notation of an overassessment can be construed as containing an implied promise to pay the amount in some other way than the Commissioner indicated upon the same document. In

[4] A certificate of overassessment informs the taxpayer that the "overassessment will be abated, credited, or refunded as indicated below." A copy of the form used for certificates of overassessment is set out in Appendix B (*infra*, pp. 26–27). Where, as in this case, the amount of the overassessment has been credited, the certificate has no entry after the word "Refunded."

the *Bonwit Teller* case this Court had before it only the question whether an action could be brought upon an account stated based upon a certificate of overassessment, after the statute of limitations upon suits under the revenue laws had expired, and no question with respect to the amount of the account was presented to or passed upon by this Court.

CONCLUSION

The credit was properly made since it was made pursuant to the taxpayer's request in its claim for credit. If it is necessary to consider the validity of the second waiver, it was valid and effective to extend the period of collection of the petitioner's 1917 tax. In any event, the petitioner is not entitled to recover upon an account stated.

We submit that the decision below is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
ERWIN N. GRISWOLD,
Special Assistant to the Attorney General.
J. R. FILLMAN,
Attorney.

NOVEMBER 1933.

APPENDIX A

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, Sec. 250 (d):

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1928, c. 852, 45 Stat. 791, 870, 875:

> SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.
>
> (a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:
>
> "(c) Where before the expiration of the time prescribed in section 277 for the assess-

ment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period, previously agreed upon."

* * * * *

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpay-

ment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U.S.C.Sup. VI, Title 26, Sec. 1670.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U.S.C.Sup. VI, Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

APPENDIX B

FORM OF CERTIFICATE OF OVERASSESSMENT

[SEAL] TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington.

CERTIFICATE OF OVERASSESSMENT

Income Tax Unit
IT:R:CC—

Number:
Allowed:
Schedule No.

An audit of your income tax return, Form and a consideration of all the claims (if any) filed by you for the year ended indicates that the tax assessed for this year was in excess of the amount due:

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You

will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully,

Abated: $

Credited: $

Year:

Account No.

Refunded: $

Deputy Commissioner.

By

Head of Division.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, petitioner

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

In its reply brief the petitioner has advanced certain arguments which we desire to answer in this supplemental brief.

A

The petitioner attacks the Government's defense of equitable estoppel as being ill-founded under established rules prescribing the requisite elements of such a defense. The Government invokes what this Court has described as the "vital principle" of equitable estoppel, namely, "that he who by his language or conduct leads another to do what he would

not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson* v. *Colgrove*, 100 U.S. 578, 580. Misrepresentations of existing fact is not necessary in order to make the principle applicable. No such element was required by this Court in the *Colgrove case*, where the plaintiff was held to be estopped to assert title to land because his predecessor in title had disavowed the intention of asserting his claims against others then in possession. The basis for the estoppel in the instant case is that the petitioner's conduct showed that it meant to have its outstanding tax accounts settled by a credit, and the Commissioner justifiably delayed collection and granted the petitioner's request. The petitioner concedes (Reply Br. 3–4) that the tax would have been timely collected if the claim for credit had not been filed. The petitioner's conduct, we submit, gave the Commissioner reasonable ground to act on the request irrespective of the statute of limitations, as upon permission given by the petitioner. Cf. Williston, *Contracts*, Section 692.[1]

The Government does not assert a defense of laches, but refers to the petitioner's paying the balance still due after the application of the credit,

[1] In this section Williston refers to estoppel of this sort as "promissory estoppel," and points out that it is not based upon a misstatement of existing fact, but a promise, agreement, or permission for future conduct, and that the "fundamental basis for the estoppel is the justifiableness of the conduct of the party claiming the estoppel."

and its acceptance of the transaction for nearly six years, in order to show that the petitioner intended events to occur as they did, and was not dissatisfied with them when they occurred. This is strong evidence, we submit, of the petitioner's intention in filing the claim for credit. Whether or not the petitioner had a perfect knowledge of the Bureau's practice upon receipt of a claim for credit is immaterial, except as it bears upon the petitioner's expectation that its request would find favor with the Commissioner; for clearly it is not necessary that the person estopped be absolutely certain that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel.[2]

The petitioner urges that the defense of equitable estoppel is not available because the statute of limitations here involved provided only one method for its avoidance, namely, a waiver. But, as pointed out in our main brief (pp. 11–12), the defense has been sustained in other tax cases where credits out of time were sought to be recovered. The case of *Botany Mills* v. *United States*, 278 U.S. 282, cited by the petitioner, is not pertinent, even by analogy, for there this Court specifically reserved decision on the question whether the agreement, which was

[2] The petitioner's argument (Reply Br. 4) that the Government's position may result in the taxpayer's debt being doubled or tripled through the accumulation of interest is obviously fallacious. By hypothesis, the tax is to be collected by credit, and interest will be running equally on both sides of the account.

defective under the statute, could, in some circumstances, be binding by estoppel (p. 289). We submit that no policy such as is involved in preventing avoidance of the statute of frauds, bars the assertion of estoppel here.

The petitioner, while contending for a strict application of the statute of limitations against the Government, bases its action upon an account stated in order to avoid the operation of the statute of limitations against taxpayers' suits. The petitioner's whole case necessarily depends on the certificate of overassessment being regarded as an "account stated" sufficient to start the statute of limitations running anew, despite the specific limitations provisions in the revenue laws. But the Commissioner's certificate was no more than an acknowledgment on his part that the tax for 1918 had been overpaid. If this is sufficient to constitute an "account stated" starting the statute of limitations anew, there is no reason, we submit, why the petitioner's claim for credit should not equally be regarded as an "account stated." The petitioner's entire conduct in the transaction (including its acquiescence in the Commissioner's action) shows, we submit, that it intended this claim to be a basis for a final settlement of its 1917 taxes, one element of which was the acknowledgment that the taxes claimed for that year were due. The petitioner should not be allowed the advantage of the account

stated theory without assuming its burdens; if the Commissioner's certificate of overassessment is an account stated, then we contend that the taxpayer's claim for credit, under the circumstances, was one too, and for this reason was sufficient to start anew the limitations period for the collection of the tax.

The petitioner further contends that if the defense of equitable estoppel may be interposed by the Government, a result is reached which is contrary to the intention of Congress as reflected in the refusal of Congress to incorporate into the Revenue Act of 1932 a proposed section that would, in effect, have validated credits made out of time when a claim for credit was filed and collection postponed. The same contention was advanced in petitions for certiorari in *Daube* v. *United States,* 75 C.Cls. 633, affirmed on another point, 289 U.S. 367, and *Ralston Purina Co.* v. *United States,* 75 C.Cls. 525. In the *Daube case,* this Court limited review to another matter (288 U.S. 597), and in the *Ralston Purina case,* the petition was denied. 289 U.S. 732. And, we submit, no intention to deny the Government the protection of the rule of equitable estoppel can be deduced from mere failure to act on the part of Congress. It may as well have indicated the belief of Congress that no such legislation was necessary to prevent refunds in cases of this sort.

B

The petitioner assails the Government's view that it is in no position to attack the validity of the waiver by which it benefited, upon the ground that the Commissioner "refused" to sign the waiver (Reply Br. 8). There is no fact in this record (aside from the mere failure to sign the waiver promptly) that shows a refusal to sign, and we submit that no valid argument can be made upon this wholly unwarranted inference.

C

With respect to the controlling force of the decision of this Court in *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, we urge again that the question now raised concerning the amount of the alleged account stated, or of the balance struck, was not passed upon by this Court. In that case this Court did not affirm a judgment of the Court of Claims for the amount sought to be recovered, but reversed a judgment dismissing a complaint. We submit that the *Bonwit Teller case* does not now compel a decision that an account is stated for an amount of the overassessment, even though the certificate upon which the account is based shows that no payment in cash of any amount of the overassessment is promised or contemplated.

The petitioner also suggests that Section 281 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 301

(U.S.C., Title 26, Sec. 1065 (a)) compelled a refund or a valid credit of the amount of the overassessment. The petitioner, however, does not quote the provisions of Section 281 (b) limiting the time within which such refunds may be made. Because of this limitation the cases of *Sage* v. *United States,* 250 U.S. 33, and *Fidelity & Deposit Company* v. *United States,* 259 U.S. 296, are plainly distinguishable, apart from the fact that they are based on the specific provisions of the Act of July 27, 1912, c. 256, Sec. 1, 37 Stat. 240, which in the language of this Court (*Sage* v. *United States, supra,* at 39) "created rights where they had not existed before."

CONCLUSION

We submit that the decision below is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
Special Assistant to the Attorney General.
J. R. FILLMAN,
Attorney.

DECEMBER, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States.

October Term, 1933

No. 133.

R. H. STEARNS COMPANY, Boston, Massachusetts,
Petitioner,

vs.

THE UNITED STATES.

MOTION FOR RECONSIDERATION

HOWE P. COCHRAN,
Counsel for Petitioner.

W. N. WOOD,
Of Counsel.

PRESS OF GIBSON BROS., INC., 1312 KYE STREET N.W., WASHINGTON, D. C.

In the Supreme Court of the United States

October Term, 1933

No. 133.

R. H. STEARNS COMPANY, Boston ,Massachusetts,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

MOTION FOR RECONSIDERATION

The petitioner above-named respectfully moves that this court reconsider its opinion for the following reasons:—

This suit was brought for the sum of $14,928,07, with such interest as is allowable at law.

The facts found by this court are as follows:—

Returns were filed by the petitioner for the fiscal years ending July 31, 1917, and July 31, 1918, and the taxes paid. An audit was made by the Commissioner of these returns, and an overpayment was found for the fiscal year ending July 31, 1918, in the sum of $14,928.07, and an additional assessment was found for the fiscal year ending July 31, 1917, in the amount of $20,757.14. (Said additional assessment was made on June 26, 1923.) The schedule of overassessments showing the overpayment of $14,928.07 for the fiscal year ending July 31, 1918, was signed March 1, 1924. The Collector signed this schedule

together with the schedule of refunds and credits on June 12, 1924, and sent them to the Commissioner, and on June 28, 1924, the Commissioner signed the schedule of refunds and credits definitely allowing the credit of $14,928.07, overpaid for the fiscal year ending July 31, 1918, to be credited to the additional assessment (assessment June 26, 1923) for the fiscal year ending July 31, 1917, in the amount of $20,757.14.

The Revenue Act of 1924 became effective on June 2, 1924, and since the schedule of refunds and credits was signed by the Commissioner on June 28, 1924, allowing this credit interest on the credit is governed by Section 1019 of the Revenue Act of 1924, (*Swift* v. *United States*, 282 U. S. 468) and consequently interest at 6% is due the petitioner on $14,928.07 from December 17, 1919 (the date it was paid) to June 26, 1923. (the date of the additional assessment against which it was credited).

The petitioner filed two suits in the Court of Claims at the same time. The contention in No. L–187, Court of Claims, which is the case before this court, was that the collection of the additional assessment for the fiscal year ending July 31, 1917, was barred on June 28, 1924, when it was paid by credit from the overpayment for the fiscal year ending July 31, 1918. The contention, of course, was that the credit was illegal and that the overpayment was due the petitioner with interest from the time it was paid down to within thirty days of the time it was refunded. The contention in No. L–186, Court of Claims, (the other suit) was that the credit was legal and that interest was due under Section 1019 of the Revenue Act of 1924. It can readily be seen that if the petitioner's contention in the case before this court had prevailed, namely, that the credit was void, he would have been entitled to no interest under the other suit (No. L–186, Court of Claims). But the very fact that the court held

the credit was legal makes interest due under the set of facts found by this court and makes the other suit (No. L–186, Court of Claims) a good cause of action.

Petitioner's attorney and respondent's attorney talked over the question of consolidating these two suits or going ahead with each suit separately. It was suggested by respondent's attorney that since interest was due the petitioner in any event, petitioner would be paid sooner if a motion was filed to suspend action on the suit for interest as due under the Swift case; since if the suit before this court was lost then respondent would settle the suit for the interest. Accordingly, the suit before this court (No. L–187, Ct. Cl.) was tried to test the legality of the credit and a motion to suspend proceedings was filed in case No. L–186, Ct. Cl. The motion stated that while the case was governed by the Swift case, nevertheless action should be deferred during the pendency of suit No. L–187, Ct. Cl.

Now the respondent seeks to dismiss the petition in suit No. L–186, Ct. Cl., on the grounds that the decision by this court in suit No. L–187, Ct. Cl. (No. 133, October, 1933 Supreme Court) renders the matter res adjudicata. As to the question of res adjudicata it seems clear to the petitioner that the decision in No. L–187, Ct. Cl. (No. 133, October, 1933, Supreme Court) did not rule on the question presented in No. L–186, Ct. Cl. It merely established a legal basis for the application of the rule for which petitioner was contending in No. L–186, Ct. Cl. If case No. L–187, Ct. Cl. covers the point presented by No. L–186, Ct. Cl., then the petitioner respectfully petitions this Honorable Court to amend its decision in No. L–187, Ct. Cl., (No. 133, October, 1933, Supreme Court) to the extent of allowing to the petitioner interest on $14,928.07 from date said tax was paid to the date of the additional assessment against which it was credited.

The facts found by this court show interest due the petitioner under the Swift decision and it respectfully asks this court issue a mandate to the Court of Claims allowing this interest, whereupon petitioner will dismiss suit No. L–186 now pending in the Court of Claims.

This motion is filed in good faith and not for the purpose of delay.

Respectfully submitted,

HOWE P. COCHRAN,
Counsel for Petitioner.

WILLIAM N. WOOD,
Of Counsel.

19 CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 133.—October Term, 1933.

R. H. Stearns Company, Boston, Massachusetts, Petitioner,
vs.
The United States, Respondent.
} On Writ of Certiorari to the Court of Claims.

[January 8, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

Upon the footing of an account stated the petitioner sues the Government for taxes overpaid.

Income and profits tax returns for the fiscal year ending July 31, 1917, were filed by the taxpayer in September, 1917. The tax shown by these returns as well as by amended returns for the same year was paid in full.

Income and profits tax returns for the fiscal year ending July 31, 1918, were filed in October, 1918, and again the tax was promptly paid.

Following the practice of the Bureau, the Commissioner proceeded to audit the returns to the end that the assessments might be increased or reduced according to the facts.

In February, 1921, the taxpayer signed and filed a waiver of any statutory period of limitation as to the assessment and collection of the tax for the calendar year 1917. It did this in order to be assured that the audit by the Commissioner would be deliberate and thorough. In the absence of such a consent the period of limitation would have expired in April, 1923. The extension was approved in writing by the Commissioner in February, 1923. The waiver on its face had no limit in respect of time, but under a regulation adopted in April, 1923, it spent its force on April 1, 1924, unless continued or renewed.

In February, 1923, the taxpayer signed a second waiver applicable to the fiscal years 1917 and 1918, and extending the period for collection until March 1, 1925. This waiver was not signed by the Commissioner within the term of its duration, though it

was signed, years afterwards, on April 7, 1930. However, in June, 1923, while both waivers were on file, the Commissioner made an additional assessment for the fiscal year ending July 31, 1917, and on the attached assessment list wrote the word "waiver" opposite the item affecting the petitioner. The additional assessment for 1917 was reduced by a credit of an overassessment for 1916, and when so reduced amounted to $20,757.14. Payment of this amount was demanded by the Collector on August 3, 1923.

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years 1918, 1919, 1920, and 1921, amounting in the aggregate to $35,727.10, and asked that the unpaid balance for 1917 be set-off against the claim for overpayment and that the remainder be refunded. At that time it was the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim.

On March 1, 1924, the Commissioner approved a schedule of overassessments which included an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the sum of $14,928.07, and sent this schedule to the Collector for action in accordance with the directions appearing thereon. On June 12, 1924, the Collector, following these instructions, signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits, certifying the application of $14,928.07 as a credit. On June 28, 1924, the Commissioner signed the schedule of refunds and credits, by which act for the first time he definitively announced his allowance of the claim. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 170; *United States* v. *Swift & Co.,* 282 U. S. 468, 475. Before doing this, and on or after March 1, 1924, he had transmitted to the petitioner a certificate of overassessment for the fiscal year ending July 31, 1918, in the sum of $14,928.07, which sum was credited in June upon the taxes overdue. This overassessment for 1918, applied as a credit upon the unpaid tax for 1917 ($20,757.14), reduced the liability of the taxpayer to $5,829.07. Demand for the payment of this balance with accrued interest was made by the Collector on September 1, 1924. Two weeks later, the petitioner complied with the demand, accepting without protest the application of the credit, and paying the resulting balance.

For nearly six years the transaction was allowed to stand unopened and unchallenged. In April, 1930, the petitioner learned through an attorney that the second waiver had not been signed by the Commissioner until after it had expired. With this knowledge it filed with the Commissioner a claim for refund of the overpaid tax for 1918 ($14,928.07) which had been collected through application as a credit upon the tax for the year before. The basis for the claim was this, that at the time of the credit the first waiver had expired, that the second waiver was ineffective because not signed by the Commissioner, that collection by credit after the term of limitation was as much prohibited as collection at such a time by suit or by distraint, and hence that the overpaid tax certified by the Commissioner in the schedule of overassessment was an undischarged indebtedness, still owing from the Government. Four days later this action was begun. The Court of Claims gave judgment in favor of the Government (2 F. Supp. 773), and a writ of certiorari brings the case here.

1. In auditing the tax for 1918 and crediting the overassessment for that year upon the tax for the year before, the Commissioner acted at the request of the petitioner, which was valid till revoked.

For the decision of this case we do not need to rule whether a "waiver" by a taxpayer consenting to the enlargement of the time for assessment or collection is ineffective unless approved by the Commissioner in writing.* There was here more than a waiver, an abandonment of a privilege to insist upon the fulfilment of a condition (*Stange* v. *United States*, 282 U. S. 270, 275, 276; *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 446); there was a positive request, which till revoked upon reasonable notice had the effect of an estoppel.

On August 3, 1923, the Collector made demand upon the petitioner for the payment of $20,757.14, the tax balance then due for the year 1917. There is no dispute that the demand was timely, and that collection would have been enforced unless the taxpayer had done something to postpone the hour of payment. Waivers were then on file, one of them signed by the Commissioner,

*See: Commissioner *v.* U. S. Refractories Corporation, 64 F. (2d) 69; affirmed by an equally divided court, — U. S. —, October 23, 1933; Atlantic Mills *v.* United States, 3 F. Supp. 699; contra: Commissioner *v.* Hind, 52 F. (2d) 1075; John M. Parker Co. *v.* Commissioner, 49 F. (2d) 254.

the other unsigned, but the petitioner did not rest upon these, nor would these without more have availed to avert the threatened levy. On August 9, 1923, the petitioner filed with the Commissioner a request to withhold the process of collection until credits were adjusted. In substance the request was this: Please do not collect the tax for 1917, until you have completed the audit for the years 1918 to 1921 inclusive, and if there has been overassessment for those years, set it off as a credit.

Now, the time for assessment and collection of the 1921 tax did not expire till 1925, and this without the aid of any waiver or extension. In such circumstances, request by the taxpayer that the Commissioner withhold collection for 1917 until there had been an audit of the tax for 1921 was at least equivalent to a request that he delay until the assessment for 1921 was due under the statute. But before that time arrived, i. e., before 1925, the Commissioner had acted. On March 1, 1924, he had completed the reaudit, and had discovered an overassessment for one of the years covered by the petitioner's request. Within a reasonable time thereafter (June 12, 1924) he had received from the Collector a report that $20,757.14 was still unpaid upon the tax for 1917. Promptly thereafter (June 28, 1924), he had complied with the petitioner's instructions by offsetting the overpayment for the one year in reduction of the balance owing for the other. The whole process had been completed within the time fixed by implication in the petitioner's request, within the time when assessment was due for the last of the group of years (1918 to 1921) to be covered by the audit.

The petitioner makes the point that by the Revenue Act of 1928 (c. 852; 45 Stat. 791, 875, § 609), a credit against a liability in respect of any taxable year shall be "void" if it has been made against a liability barred by limitation. The aim of that provision, as we view it, was to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval or with an approval falling short of inducement or request. Cf. *Stange* v. *United States, supra;* Revenue Act of 1928, § 506 (b) (c), c. 852, 45 Stat. 791, 870, 871. If nothing more than this appeared, there was to be no exercise *in invitum* of governmental power. But the aim of the statute suggests a restraint upon its meaning. To know whether liability has been barred by limita-

tion it will not do to refer to the flight of time alone. The limitation may have been postponed by force of a simple waiver, which must then be made in adherence to the statutory forms, or so we now assume. It may have been postponed by deliberate persuasion to withhold official action. We think it an unreasonable construction that would view the prohibition of the statute as overriding the doctrine of estoppel (*Randon* v. *Tobey*, 11 How. 493, 519) and invalidating a credit made at the taxpayer's request. Here at the time of the request, the liability was still alive, unaffected as yet by any statutory bar. The request in its fair meaning reached forward into the future and prayed for the postponement of collection till the audits for later years had been completed in the usual course. This having been done, the suspended collection might be effected by credit or by distraint or by other methods prescribed by law. Congress surely did not mean that a credit was to be void if made by the Government in response to such a prayer.

The applicable principle is fundamental and unquestioned. "He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect 'this is your own act, and therefore you are not damnified.'" *Dolan* v. *Rodgers*, 149 N. Y. 489, 491; and *Imperator Realty Co.* v. *Tull*, 228 N. Y. 447, 457; quoting *West* v. *Blakeway*, 12 Man. & G. 729, 751. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. *Imperator Realty Co.* v. *Tull*, *supra*. A suit may not be built on an omission induced by him who sues. *Swain* v. *Seamens*, 9 Wall. 254, 274; *United States* v. *Peck*, 102 U. S. 64; *Thomson* v. *Poor*, 147 N. Y. 402; *New Zealand Shipping Co.* v. *Société des Ateliers*, [1919] A. C. 1, 6; Williston, Contracts, Vol. 2, §§ 689, 692.

2. If we assume in favor of the petitioner that the credit is a nullity in the absence of a written waiver, approved by the Commissioner, the record supports the inference that at the time of the set-off such approval had been given.

The statute provides that no suit or proceeding shall be begun for the collection of the tax after the expiration of five years suc-

ceeding the filing of the return "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection." Revenue Act of 1921; c. 136; 42 Stat. 227, 265, § 250 (d). In this case, consent by the taxpayer in due form is found and indeed conceded. The only question is whether there was consent by the Commissioner. But the statute does not say that the evidence of consent shall be embodied in a single paper. Cf. *Eclipse Lawn Mower Co.* v. *United States,* 1 F. Supp. 768. Its one requirement in respect of form is that the consent shall be in writing. *Sabin* v. *United States,* 70 Ct. Claims, 574. There is left a wide range of administrative discretion. Any writing, formal or informal, is sufficient if made for the purpose of recording the Commissioner's approval, and if approval may be gathered therefrom as a reasonable inference.

The burden was on the petitioner, seeking a refund of its tax, to prove its allegation that the overassessment for 1918 had been illegally credited upon the tax for 1917. At the outset it might have stood upon the fact that the credit had been made after the normal term of limitation, casting the burden on the Government of going forward with evidence in proof of an extension. When its own waiver had been proved, however, the case took on another aspect. At that stage the presumption of official regularity was sufficient to sustain the inference that the Commissioner on his side had done whatever was appropriate to give support to his own act and thus validate the credit. Acts done by a public officer "which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." *Bank of the United States* v. *Dandridge,* 12 Wheat. 64, 70; *United States* v. *Royer,* 268 U. S. 394, 398; *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 97; *Mandeville* v. *Reynolds,* 68 N. Y. 528, 534; *Demings* v. *Supreme Lodge Knights of Pythias,* 131 N. Y. 526, 527: Wigmore, Evidence, Vol. 5, § 2524. No doubt the presumption of regularity is subject to be rebutted. It stands until dislodged.

Now, the petitioner has failed to show that the Commissioner did not approve in writing. On the contrary the evidence is persuasive that he did. A certificate of an additional assessment for the fiscal year ending July 31, 1917, was signed, as we have seen, on June 26, 1923; and on the assessment list attached thereto, opposite the entry of the assessment against the petitioner, the fol-

lowing appears: "7/31/17 Fisc. 1753361. O. L. 4/17/23; waiver." The Commissioner did not sign his name below the memorandum, but the memorandum was attached to a certificate which the Commissioner did sign, and his name subscribed to the certificate authenticates also the documents attached to it, if we assume in favor of the petitioner that signing is essential. The Court of Claims was of the opinion that the word "waiver" on this list had relation to the second of the two consents on file with the Commissioner. The context and the circumstances lend support to that conclusion. The fiscal year for the petitioner ended July 31. Probably through inadvertence, the first waiver refers to a tax for the calendar year ending December 31. This might have seemed to exclude the first six months of the year ending July 31, 1917, i. e., the period from July 31, 1916 to January 1 following. We do not say that the courts would uphold so literal a construction. Almost certainly the objection, if made, would be put aside as hypercritical. See 39 Stat. c. 463, p. 770, § 13. Even so, the memorandum may well be allocated to the waiver that fits it precisely in preference to the one that fits it imperfectly. We turn, then, to the documents in order to relate them to one another. If we look only to its letter, the memorandum does not refer to a waiver for the calendar year ending December 31, 1917. It refers, on the contrary, to a waiver for the fiscal year ending July 31, 1917 (7/31/17). The only waiver corresponding to this description in form as well as in substance is the one filed with the Commissioner February 19, 1923, which covers the year ending July 31, 1917, as well as the year after.

The inference, therefore, is legitimate that the second of the two waivers is the one that the Commissioner had in view when he wrote this memorandum indicative of assent. At the very least the effect of the entry is to leave the purpose of the writer doubtful. Choice between two doubts should be made in such a way as to favor the presumption of official regularity.

3. The petitioner has failed to make out the existence of an account stated for its benefit, and its claim, even if otherwise valid, is barred by limitation.

Payment of the tax for the fiscal year ending July 31, 1918, was made by the petitioner, partly in 1918, and partly in 1919. Five years from the date of payment, a statute of limitations set up a

bar to a suit for the recovery of the tax on the ground of illegal assessment or collection. R. S. § 3226; 26 U. S. C. § 156; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265. The petitioner, conceding this, maintains that in March, 1924, there was a statement of an account, giving rise to a new cause of action with a new term of limitation. *Daube* v. *United States,* 289 U. S. 367, 370; *Bonwit Teller & Co.* v. *United States, supra.* This suit was not brought till May, 1930. In the absence of an account stated in its favor the petitioner must fail.

A recent judgment of this court recalls the essentials of an account stated as they were long ago defined. *Daube* v. *United States, supra.* A balance must have been struck in such circumstances as to import a promise of payment on the one side and acceptance on the other. But plainly no such promise is a just or reasonable inference from the certificate of overassessment delivered to this taxpayer, if the certificate is interpreted in the setting of the occasion. The taxpayer knew that the Commissioner had been requested, after determining the overassessment, to set it off against the tax for an earlier year. The taxpayer knew also that the set-off or credit would not appear on the face of the certificate of overassessment, but would require reference to another and later document, the schedule of refunds and credits. The diverse functions of these documents were pointed out by this court in *United States* v. *Swift & Co.,* 282 U. S. 468, 475 and *Girard Trust Co.* v. *United States,* 270 U. S. 163, 170. The taxpayer knew also that it had signed a formal waiver extending the term of collection until March, 1925, and it had no reason to believe that this waiver had not been signed by the Commissioner, if it be assumed for present purposes that such a signature was necessary. Plainly, in such circumstances the certificate of overassessment without more does not import a promise by the Commissioner to refund the amount there certified instead of applying it as a credit upon the tax of an earlier year. At most the promise to be implied is one to refund the excess after there has been a computation of the taxes unpaid for other years and an ascertainment of the balance. The statement of the account is not unconditional and definitive. It is provisional and tentative. Finality was lacking until there was an agreement as to credits. *Newburger-Morris Co.* v. *Talcott,* 219 N. Y. 505, 512.

The events that followed confirm this interpretation of the effect of the transaction. Upon a computation of the credits the final balance was ascertained to be in favor of the Government. The balance thereby fixed was reported to the taxpayer. After the schedule of refunds and credits had been signed by the Commissioner, the Collector transmitted to the taxpayer a new statement of account by which it was clearly made to appear that the overassessment had been credited upon the tax for 1917, and that after such credit there was still owing from the taxpayer a balance of $5,829.07, which, together with the accrued interest, was thereupon collected. Then for the first time was there a final ascertainment of the balance upon consideration of both sides of the account, the debits and the credits. The taxpayer did not object to the account as submitted in its final form. Far from objecting, it paid the resulting balance, and by this act as well as by silence conceded the indebtedness. Indeed there was more than an account stated; by force of voluntary payment there was also an account settled. *Lockwood* v. *Thorne*, 18 N. Y. 285, 292. The statute of limitations is a bar to the recovery by the petitioner of the balance paid to the Government upon the demand of the Collector. This is not disputed. It is equally a bar to the recovery of any item that entered into the account and determined the balance as thus definitively adjusted.

The judgment is

Affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.